No. 92-725-CFH
Status: GRANTED

Title: Salvador Godinez, Warden, Petitioner
v.
Richard Allan Moran

Docketed:
October 16, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Sarnowski,David F.

Counsel for respondent: Potter,Cal J.

Docket fee recd Oct. 26.

Entry	Date	Note	Proceedings and Orders
1	Oct 16 1992	D	Petition for writ of certiorari filed.
3	Nov 16 1992		Brief of respondent Richard Allen Moran in opposition filed.
4	Nov 16 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
2	Nov 24 1992		DISTRIBUTED. December 11, 1992
5	Dec 14 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Dec 14 1992		Petition GRANTED.
			**********
7	Dec 21 1992	G	Motion of respondent for appointment of counsel filed.
8	Jan 4 1993		REDISTRIBUTED. January 8, 1993
9	Jan 7 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
10	Jan 11 1993		Motion for appointment of counsel GRANTED and it is ordered that Cal J. Potter, III, Esquire, of Las Vegas, Nevada, is appointed to serve as counsel for the respondent in this case.
15	Jan 27 1993		Brief amicus curiae of Criminal Justice Legal Foundation filed.
12	Jan 28 1993		Brief amicus curiae of United States filed.
13	Jan 28 1993		Joint appendix filed.
14	Jan 28 1993		Brief of petitioner Salvador Godinez, Warden filed.
16	Jan 28 1993		Brief amicus curiae of United States filed.
17	Feb 10 1993	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Feb 19 1993		Order extending time to file brief of respondent on the merits until March 5, 1993.
18	Feb 22 1993		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Mar 5 1993		Brief amici curiae of American Psychiatric Association, et. al. filed.
22	Mar 5 1993		SET FOR ARGUMENT WEDNESDAY, APRIL 21, 1993. (3RD CASE).
23	Mar 5 1993		Brief amici curiae of American Civil Liberties Union, et al. filed.
25	Mar 5 1993	X	Brief of respondent Richard Allan Moran filed.
26	Mar 5 1993		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.

No. 92-725-CFH

Entry	Date	Note	Proceedings and Orders
24	Mar 10 1993		CIRCULATED.
27	Mar 18 1993		LODGING by respondent. Unpublished Miami Law Review article, The Competence of Criminal Defendants: Beyond Dusky and Drope.
28	Apr 8 1993		Record filed.
		*	Original proceedings United States District Court of Nevada. (1 BOX)
29	Apr 21 1993		ARGUED.

92-725 (1)

No. .....

FILED
OCT 16 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,

Petitioner,

v.

RICHARD ALLAN MORAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

I. Whether federal courts can require a heightened standard of mental competency when a state criminal defendant (1) enters a plea of guilty, and (2) waives counsel.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison

Petitioner,

v.

RICHARD ALLAN MORAN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Salvador Godinez[1], Warden of the Ely State Prison, Nevada Department of Prisons, and files this petition for writ of certiorari seeking a reversal of the opinion of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 30, 1992, and is reproduced in Appendix A. Moran v. Godinez, ____ F.2d _____ (9th Cir. 1992). The federal district court's opinion which immediately preceded the circuit court litigation is reproduced in Appendix B.

[1] The named Petitioner, Salvador Godinez, as Warden of the Ely State Prison, Nevada Department of Prisons, had custody of respondent Moran at the time of the filing of the petition for writ of habeas corpus in the United States District Court. Since the filing of the petition for writ of habeas corpus in the United States District Court, Godinez has been succeeded by Sherman Hatcher as Warden of the Ely State Prison. Petitioner is referred to hereinafter as the State.

On direct appeal from the state court convictions, the Nevada Supreme Court entered its published opinion on March 31, 1987. It is reproduced in Appendix C. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987). The order of the Eighth Judicial District Court of the State of Nevada, County of Clark, denying post-conviction relief, was filed on May 10, 1988. It is reproduced in Appendix D. The Nevada Supreme Court's unpublished order dismissing appeal from the denial of relief on the petition for post-conviction relief was filed on March 15, 1989. It is reproduced in Appendix E. This Court denied certiorari on October 2, 1989. It is reproduced in Appendix F.

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a habeas corpus petition in March, 1991. See 28 U.S.C. §§ 1331, 2241, 2254. An appeal was taken by respondent

following the denial of habeas relief and the issuance of a certificate of probable cause. See id., §§ 1291, 2253. The judgment of the Court of Appeals for the Ninth Circuit was filed on July 30, 1992. This petition for writ of certiorari is filed within 90 days of the judgment of the Court of Appeals below. Supreme Court Rule 20. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 to the United States Code.

STATUTORY PROVISIONS INVOLVED

Since this action concerns constitutional issues, there are no federal statutory provisions involved.

STATEMENT OF THE CASE

The State has lawful custody of respondent Richard Allen Moran [hereinafter referred to as MORAN] pursuant to two convictions for first degree murder and resultant sentences of death imposed in the Eighth Judicial District Court of the State

of Nevada, in and for the County of Clark, district court case, along with two counts of robbery with the use of a deadly weapon and one count of first degree murder sustained in the same case, with the resultant prison terms imposed thereon. MORAN is also in custody pursuant to a conviction for one count of first degree murder and the resultant term of life imprisonment without the possibility of parole sustained in another case in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. The first set of charges [hereinafter referred to as the Red Pearl Saloon offenses] proceeded through the criminal justice system separately from the third murder offense [hereinafter the Vandevoort murder]. Eventually, criminal informations were filed in both cases in the same trial court. Thereafter, MORAN appeared before the trial court judge, Judge Leavitt, with attorneys assigned to each case. After a

canvass, the court allowed MORAN to discharge counsel and to waive his right to the assistance of an attorney After an extensive canvass, the court (1) accepted MORAN's pleas of guilty to all charges in both cases; (2) scheduled imposition of court sentencing on the non-capital charges; (3) accepted MORAN's accession to a consolidated penalty hearing on both cases; and (4) scheduled the penalty hearing on the capital charges.

On December 17, 1984, MORAN appeared before Judge Leavitt in proper person. The judge advised him that in the judge's opinion, it was unwise on MORAN's part not to have the assistance of an attorney and the court confirmed MORAN's previous assertion that he did not wish to have standby counsel to assist him. The court asked MORAN if he wanted to reconsider either of those decisions and to have the assistance of an attorney. MORAN indicated that he did

not. Additionally, MORAN indicated that he did not want to withdraw his plea in either case. MORAN further indicated that he did not wish to have any witnesses present on his behalf at the penalty hearing.

On January 21, 1985, MORAN appeared without counsel for sentencing on the non-capital counts. The court ordered imposition of consecutive fifteen (15) year terms for the robbery counts and use enhancements, as well as the arson count. A separate judgment thereon was entered thereon was entered on January 21, 1985.

Later that same day, a three judge panel consisting of Judge Leavitt, Carson City District Judge Michael E. Fondi and Washoe County District Judge Peter I. Breen, convened to consider evidence pertaining to the penalty to be imposed on the three murder counts. In the Red Pearl Saloon murders, the panel found the existence of two aggravating circumstances beyond a

reasonable doubt. It also found the existence of two mitigating circumstances. The panel found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and set the penalty at death as to both counts.

In the Vandevoort murder, the panel found the existence of two aggravating circumstances beyond a reasonable doubt. It also found the existence of one mitigating circumstance. The court found that beyond a reasonable doubt, the mitigating circumstance was insufficient to outweigh the aggravating circumstances. It set the penalty at death. A Judgment of Conviction on each of the murder counts was entered on January 21, 1985.

Thereafter, the cases proceeded on to litigation on direct appeal to the Nevada Supreme Court. The cases were consolidated for the court's consideration. On March 31,

1987, the court issued its published opinion affirming all convictions and sentences in the Red Pearl Saloon case. It modified the sentence for the Vandevoort murder from death to life without the possibility of parole.

On July 30, 1987, MORAN filed a petition for post-conviction relief in the same trial court. After a response from the state and an evidentiary hearing, the court entered its order denying post-conviction relief on May 10, 1988. From that denial, MORAN appealed to the Nevada Supreme Court. On March 15, 1989, the Nevada Supreme Court entered its unpublished order dismissing appeal, denying relief as to each of the challenges the convictions and sentences.

Thereafter, MORAN sought certiorari from this Court. After the state opposed the certiorari request, this Court denied certiorari.

Thereafter, MORAN filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. That petition was denied by the United States District Court, District of Nevada, unofficial northern division, in its memorandum decision and order entered March 11, 1991. From that denial, MORAN appealed to the United States Court of Appeals for the Ninth Circuit. On July 30, 1992, the United States Court of Appeals for the Ninth Circuit entered its opinion reversing the district court judgment denying habeas relief and remanding with instructions. In this opinion, the court held that the correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. Specifically, the court held that this heightened level standard was required when MORAN waived counsel and when he pled guilty. The State now seeks review of the

circuit court's opinion with this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

There are special and important reasons for granting the writ. The Ninth Circuit has decided important questions of law in ways which conflict with most other federal circuit courts by requiring a heightened standard of mental competency when an individual enters a plea of guilty or waives his right to counsel compared to when he goes to trial.

Secondly, the lower court decided an important question of constitutional law which has not been, but should be, settled by this Court. In Dusky v. United States, 362 U.S. 402, 50 S.Ct. 788, 4 L.Ed.2d 824 (1960), this court announced the standard for mental competency to stand trial. The overwhelming number of circuits have applied this same standard to an entry of plea. However, the Ninth Circuit Court of Appeals

has created a heightened standard for mental competency to enter a plea and/or to waive counsel. Therefore, this Court should take the opportunity to enunciate the standard for mental competency to enter a plea and waive counsel.

Furthermore, the Ninth Circuit Court of Appeals has cast aside the findings of the state court and lower federal court because neither applied this heightened standard (although the standard had not been urged upon them in previous proceedings).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NO LESS THAN EIGHT FEDERAL COURTS OF APPEAL REGARDING THIS SAME ISSUE, AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(a) OF THIS COURT.

It is the State's position that the circuit court erred in concluding that a heightened standard for mental competency was required for a waiver of counsel and a

plea of guilty. Even though MORAN had been found to be competent to stand trial, the circuit court incorrectly concluded that there is a higher "reasoned choice" standard to determine the competency of an individual to waive his right to counsel and to enter a plea of guilty. The vast majority of the circuits examining the question of what degree of mental competency is necessary to plead guilty have concluded that the standard of competency to plead is the same as the standard of competency to stand trial. See Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1975); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975); United States v. Simmons, 961 F.2d 183 (11th Cir. 1992); Wolff v. United States, 430 F.2d 443 (10th Cir. 1970); Butler v. United States, 384 F.2d 522 (8th Cir. 1967); Stanley v.

Lockhart, 941 F.2d 707 (8th Cir. 1991); United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960). At a minimum, all of these circuits heretofore mentioned have actually applied the standard of mental competency to stand trial as the standard used to enter a plea of guilty. The remainder have stated outright that the standard of mental competency to be applied at the time of entry of plea is the same as that for trial. The only circuits that have applied a contrary and higher standard are the Ninth Circuit Court of Appeals and the District of Columbia Court of Appeals. See Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

In enunciating the standard, most courts usually cite the standard announced in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). That standard states that the "test must be

whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as a factual understanding of the proceedings against him." See discussion in Allard v. Helgemoe, supra, at p.4. While admittedly, the Dusky standard involved the issue of mental competency to stand trial, this language has generally been used to establish the standard for entering a plea of guilty. The Ninth Circuit Court of Appeals takes the position the standard of competency should be higher for the entry of a plea than that applied to a person wishing to stand trial. The reasons stated by the Ninth Circuit Court of Appeals in applying a heightened standard of mental competency in order to plead guilty have been considered and rejected by other circuits. See e.g. Malinauskas v. United States, supra at pp.652-654. Specifically,

the lower court concluded that the correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning - the capacity for a "reasoned choice" - than that required to stand trial. However, other circuits have held that the standard is the same; that is, whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.

II. THE LOWER COURT DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(c) OF THIS COURT.

This Court set out the standard for judging an individual's competency to stand trial in Dusky v. United States, supra, in the following language: "[T]he test must be whether [the defendant] has sufficient

present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." This Court has never considered the precise issue of whether the standard for mental competency of an accused to voluntarily plead guilty is the same as that to stand trial. With the exception of two circuits, the Ninth Circuit and the D.C. Circuit, nearly all of the remaining circuits have interpreted the Dusky standard to apply to pleas of guilty. See Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1975); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975); United States v. Simmons, 961 F.2d 183 (11th Cir. 1992); Wolff v. United States, 430 F.2d 443 (10th Cir. 1970); Butler v. United States, 384

F.2d 522 (8th Cir. 1967); Stanley v. Lockhart, 941 F.2d 707 (8th Cir. 1991); United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960). Contrary, Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976). The reasoning underlying the decision in Dusky, while convincing to many circuits, has concededly remained unsettled by this Court. The Ninth Circuit Court of Appeals' interpretation not only impacts state habeas petitioners, but federal defendants as well. Therefore, this Court should take this opportunity to consider the issue and to enunciate the state of the law pertaining to the standard of mental competency to enter a plea of guilty and to waive counsel.

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III. THE DISREGARD OF THE STATE COURT FINDINGS AND THE FEDERAL DISTRICT COURT FINDINGS BY THE NINTH CIRCUIT COURT OF APPEALS IS ANOTHER COMPELLING REASON TO GRANT THE WRIT.

A third reason for granting certiorari in this case relates to the Ninth Circuit Court of Appeals' disregard for the state court findings and even the lower district court findings on this issue. The findings of historical fact of the state courts are entitled to deference in this Court. 28 U.S.C. § 2254(d). The Ninth Circuit Court of Appeals simply did not apply that standard. In line with apparent continuing opposition to state death penalty cases, the panel below chose to disregard not only the trial court's findings and the Nevada Supreme Court's findings, but the findings of the federal district court. The state trial court not only conducted an extensive canvass of MORAN, but also conducted an evidentiary hearing on the issue of MORAN's mental competency to enter his plea of

guilty and to waive counsel. The trial court had an opportunity to observe the demeanor of MORAN and to weigh the evidence in general. There was no question that in the court's mind MORAN was mentally competent to enter his plea of guilty and to waive counsel. The Ninth Circuit Court of Appeals has cast aside those findings and concluded that the state court didn't apply the right standard. This standard had never been urged upon any of the courts, state or federal, in previous proceedings. In reality, the Ninth Circuit Court of Appeals has substituted its judgment for that of the state trial court, based on its reading of the cold and naked transcript of the state court hearings.

Left intact, the Ninth Circuit Court's holding virtually ensures a stream of claims from state prisoners within the Ninth Circuit Court of Appeals that they were mentally incompetent at the time of entry

of their pleas. As it stands, the circuit court's opinion imposes a greater standard of mental competency to enter a plea of guilty than is mandated by the Constitution or this Court. This Court should take the opportunity to address the impropriety of the Ninth Circuit's approach, which is inconsistent with this Court's prior holdings as well as in conflict with nearly every other circuit court of appeals.

CONCLUSION

For the reasons stated above, the petitioner asks that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue and that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ALLAN MORAN, Petitioner-Appellant,	No. 91-15609
vs.	D.C. No. CV-N-89-819-HDM
SALVADOR GODINEZ, Warden, Respondent-Appellee.	OPINION

Appeal from the United States District Court for the District of Nevada
Howard D. McKibben
District Judge, Presiding

Argued and Submitted
February 19, 1992 -- Pasadena, California

Filed July 30, 1992

Before: Jerome Farris, Harry Pregerson, and David R. Thompson, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Individual Rights/Constitutional Rights/ Criminal Law and Procedure/Defendants and Accused, Rights of/Due Process/Right of Counsel

Reversing a district court judgment denying habeas relief and remanding with instructions, the court of appeals held that

the Nevada state court's failure to hold a hearing to determine appellant's competency to discharge his counsel and plea guilty to capital murder, thus waiving a number of constitutional rights and resulting in the imposition of the death penalty, as opposed to determining his competency to stand trial on the basis of inadequate psychiatric reports so couched, was a violation of due process.

In November, 1984, appellant Richard Allan Moran appeared before the Nevada state court on charges of capital murder while still recovering from a suicide attempt after having killed three individuals. At that time, while stating that he was taking four different kinds of medication, and absent any further inquiry by the court, he discharged his counsel, changed his pleas to guilty, refused the court's offer of standby counsel, and announced that he wanted no mitigating evidence presented on

his behalf. The state court accepted Moran's waiver of counsel and pleas of guilty, which Moran communicated in a series of monosyllabic responses to leading questions from the court about his legal rights and the charged offenses. Moran was sentenced to death. In 1987, Moran filed a petition for postconviction relief in state court, alleging that he was not legally competent to waive his right to counsel and enter guilty pleas in 1984. After an evidentiary hearing, the state court concluded that Moran had been competent to waive counsel in 1984 and failed to prove that his guilty pleas were involuntary. The Nevada Supreme Court affirmed. A petition for habeas relief was denied by the district court.

[1] The court stated that when Moran discharged his counsel and pled guilty, he effectively waived his right to counsel, compulsory process, confront witnesses, a

public trial, a jury of his peers, and his privilege against self-incrimination. Because such an extensive waiver of constitutional rights demands "utmost solicitude" from courts, the court is required to indulge in every reasonable presumption against waiver of constitutional rights. [2] In this case, there was substantial evidence available at the time Moran pled guilty to trigger a good faith doubt in the state court about Moran's competency to make a voluntary, knowing, and intelligent waiver of constitutional rights. Not only had Moran attempted suicide and all of his responses to the state court's questions were monosyllabic, but he apprised that court that he was taking medication and was specifically discharging his counsel to ensure that no mitigating evidence was presented on his behalf at his sentence. [3] Due process required the state court to hold a hearing to evaluate and determine

Moran's competency to waive constitutional rights before it accepted his decision to discharge counsel and change his plea. The state court failed to do this at the plea hearing. [4] This error was not cured by the postconviction hearing held more than three years later because the state court's ruling that Moran had been competent to waive his constitutional rights was premised on the wrong legal standard of competency. [5] Even if the presumption of correctness could apply to a state court's finding that a defendant was competent to waive constitutional rights, it could not apply in this case because of the wrong legal standard used to evaluate Moran's competency. [6] The correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning -- the capacity for "reasoned choice" -- than that required to stand trial. [7] Psychiatric reports relied on

by the state court, and prepared solely to determine Moran's competency to stand trial in 1984, never addressed the question of whether Moran was competent to waive counsel or plead guilty, and were the sole support for the state court's postconviction ruling that Moran was competent to waive counsel. By relying solely on the psychiatrists' conclusions that Moran had been competent to stand trial three years earlier, the state court applied the wrong legal standard for determining Moran's competency to waive his constitutional right to counsel in 1987. [8] Neither could the court conclude that the state court applied the proper standard of competency to the question of whether Moran was competent to plead guilty. The same erroneous standard of competency was applied when the state court concluded that Moran failed to prove that his guilty pleas were involuntary.

[9] Nonetheless, when the court examined the record in light of the correct legal standard, the court concluded that it could not support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights. [10] Although the psychiatric observations relied on by the state court were relevant to the question of whether Moran was competent to stand trial, they were inadequate to show that he was competent, according to the higher standard of reasoned choice, to make a valid waiver of constitutional rights.

COUNSEL

Cal J. Potter, III, Las Vegas, Nevada, for the petitioner-appellant.

Stuart J. Newman, Deputy Attorney General, Carson City, Nevada, for the respondent-appellee.

OPINION

PREGERSON, Circuit Judge:

Richard Moran was convicted and sentenced to death by a Nevada state court for three counts of capital murder. After exhausting his state remedies, Moran filed a petition in federal district court for a writ of habeas corpus. The district court denied Moran's petition and Moran appeals. For the reasons set forth below, we reverse.

I.

Richard Moran was still recovering from a suicide attempt in which he had slashed his wrists and shot himself in the abdomen when he appeared before a Nevada state court in November 1984 charged with three counts of capital murder. At that time, he discharged his counsel, changed his pleas to guilty, refused the court's offer of standby counsel, and announced that he wanted no mitigating evidence presented on his behalf. Moran expressed extreme remorse over shooting and killing two people at the Red Pearl Saloon and then shooting and killing

his ex-wife Linda Vandervoort at her home several days later.

On the day that Richard Moran discharged his counsel and changed his pleas, he was taking four different kinds of drugs. When the state judge asked Moran if he were taking drugs, he replied that he was on medication. The state judge inquired no further on this issue. The court accepted Moran's waiver of counsel and pleas of guilty, which Moran communicated in a series of monosyllabic responses to leading questions from the court about his legal rights and the charged offenses. In January 1985, a three-judge sentencing panel of the state court sentenced Moran to death.[1]

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[1] Under Nevada Law, the sentencing hearing for first-degree murder is conducted by a three-member panel of state judges in cases where the defendant was tried without a jury. Nev. Rev. Stat. Ann. § 175.552. The method of execution is lethal injection. Nev. Rev. Stat. Ann. § 176.355.

In July 1987, Moran filed a petition in state court for postconviction relief alleging that in November 1984 he was not legally competent to waive his right to counsel and to enter pleas of guilty. After an evidentiary hearing in April 1988, the state court concluded that Moran had been competent to waive counsel in November 1984 and that he had failed to prove that his guilty pleas were involuntary. The Nevada Supreme Court affirmed.

The federal district court denied Moran's petition for a writ of habeas corpus. On appeal, Moran maintains that he was not legally competent to make a voluntary, knowing, and intelligent waiver of constitutional rights at the time he discharged his counsel and changed his pleas to guilty.

We review the district court's denial of Moran's habeas petition de novo. *Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987),

cert. denied, 488 U.S. 871 (1988) (citing *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), *cert. denied*, 474 U.S. 841 (1985)). We agree with Moran that the record does not support a conclusion that he was competent to make a valid waiver of constitutional rights.[2]

II.

[1] When Moran discharged his counsel and pled guilty, he effectively waived a number of constitutional rights. In particular, Moran waived his right to counsel, to compulsory process, to confront witnesses, to a public trial, to a jury of his peers, and his privilege against self-incrimination. *See Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Sieling v. Eyman*, 478 F.2d 211, 214 (9th Cir. 1973). Such an extensive waiver of constitutional rights

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[2] Consequently, we need not reach the other issues raised by Moran on appeal.

demands "utmost solicitude" from courts. *Sieling*, 478 F.2d at 214 (citing *Boykin*, 395 U.S. at 243). We must indulge in every reasonable presumption against waiver of constitutional rights. *Evans v. Raines*, 800 F.2d 884, 885 (9th Cir. 1986) (hereinafter *Evans II*).

Due process requires a court to initiate a competency hearing, on its own motion if necessary, whenever it has or should have a good faith doubt about a defendant's competency to waive constitutional rights. *Seiling v. Eyman*, 478 F.2d 211 (9th Cir. 1973) (competency to enter a guilty plea); *Chavez v. United States*, 656 F.2d 312 (9th Cir. 1981) (same); *Evans v. Raines*, 705 F.2d 1479 (9th Cir. 1973) (hereinafter *EvansI*) (competency to waive counsel); *Harding v. Lewis*, 834 F.2d 853 (9th Cir. 1987) (same), *cert. denied*, 488 U.S. 871 (1988). A good faith doubt should arise if there is substantial evidence of incompe-

tence. *Harding*, 834 F.2d at 856 (citing *United States v. Veatch*, 674 F.2d 1217, 1223 (9th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982)).

[2] In Moran's case, there was substantial evidence available at the time he pled guilty to trigger a good faith doubt about his competency to waive constitutional rights. Moran had attempted suicide only a few months before his plea hearing.[3] In addition, Moran stated at the plea hearing that he wanted to fire his attorney to ensure that no mitigating evidence would be presented on his behalf at sentencing. Reporter's Transcript of Plea Hearing, November 24, 1985 at 11. The transcript of the plea hearing shows that virtually all of Moran's responses to the court's ques-

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[3] In *Drope v. Missouri*, 420 U.S. 162, 180 (1975), the Supreme Court relied on Drope's recent suicide attempt as one of the factors supporting its conclusion that the state court should have held a hearing to determine his competency to stand trial.

tions were monosyllabic. Furthermore, at the time he discharged his counsel and changed his pleas to guilty, Moran was taking four different kinds of medication, including Inderal, Dilantin, Phenobarbitol, and Vistaril. Amended Petition for Writ of Habeas Corpus, U.S. District Court for the District of Nevada, Exhibit III.[4] Although the transcript shows that Moran advised the court that he was taking medication, no further inquiry was made on this subject.

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[4] Inderal, commonly known as a "beta-blocker," is used in the management of hypertension. Physicians' Desk Reference (42d ed. 1988) at 650-52; Docket No. 26, Exhibit III (PDR excerpts). Dilantin is an antiepileptic drug which inhibits the spread of seizure activity in the motor cortex and is related to barbiturates in its chemical structure. *Id.* at 1543-45. Vistaril is used for the relief of anxiety and tension associated with psychoneurosis. It acts on certain key regions of the sub-cortical area of the central nervous system. *Id.* at 1625-26. Phenobarbitol is a sedative generally used in conjunction with other drugs to counteract central nervous system stimulation. *Id.* at 1667-68.

Reporter's Transcript of Plea Hearing, November 24, 1985 at 12.

[3] Given the record in this case, the state court should have entertained good faith doubt about Moran's competency to make a voluntary, knowing, and intelligent waiver of constitutional rights. Due process therefore requires the court to hold a hearing to evaluate and determine Moran's competency to waive constitutional rights before it accepted its decision to discharge counsel and change his pleas. This the state court failed to do.

III.

[4] Respondent contends that any error made when the state court failed to inquire into Moran's competency to waive constitutional rights at the plea hearing was cured by the postconviction hearing held more than three years later. We disagree.

After the postconviction hearing, the state court ruled that Moran was competent

to waive counsel and that he failed to meet his burden of proving that his pleas were involuntary. For two reasons, this ruling did not constitute a valid finding that, in November 1984, Moran was competent to waive his constitutional rights. First, the state court's postconviction ruling was premised on the wrong legal standard of competency. Second, as we discussed in part B. below, an examination of the record in light of the correct legal standard does not show that Moran was competent to waive his constitutional rights.

A.

[5] It is unclear whether the presumption of correctness accorded to a state court's findings of fact under 28 U.S.C. § 2254(d)[5] extends to a state court's finding

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[5] Section 2254(d) of Title 28, U.S. Code provides that:

> In any proceeding in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a (continued...)

that a defendant was competent to waive constitutional rights.[6] Even if the pre-

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[5](...continued)

> determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct . . . .

[6] *Creech v. Arave*, 947 F.2d 873, 879 n.5 (9th Cir. 1991) ("It is unclear whether a state court's determination of competency to plead guilty is entitled to a presumption of correctness under 28 U.S.C. § 2254(d)," and comparing *Harding*, where we applied the de novo review standard to competency to waive counsel, with *Evans II*, 800 F.2d at 887), *cert. granted*, 60 U.S.L.W. 3841 (U.S. June 15, 1992) (No. 91-1160). *See also Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988) ("In this circuit, a federal court must conduct an independent review of the validity of a waiver."); *Grooms v. Kinney*, 826 F.2d 883, 887 (9th Cir. 1987) (citing the holding in *Miller v. Fenton*, 474 U.S. 104 (1985), that voluntariness of a confession is subject to independent federal review, in discussing whether waiver of counsel was knowing, voluntary, and intelligent).

A different reading of the case suggests that our circuit is not split on the question whether a state court's competency determination is entitled to the presumption of correctness under section 2254(d). The question turns on the issue (continued...)

sumption of correctness could apply to a state court's finding that a defendant was competent to waive constitutional rights, it cannot apply in Moran's case. This is so because, as the following discussion demonstrates, the state court applied the wrong legal standard to evaluate Moran's competency to waive constitutional rights.

[6] The legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional

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[6](...continued)
for review. Whether a defendant's waiver was knowing and intelligent is a mixed question of law and fact that we review de novo. *See Harding*, 834 F.2d at 857. Competency determinations, however, have been accorded the presumption of correctness. *See Evans II*, 800 F.2d at 886-87 (competency to waive counsel). It is not clear that these two propositions are in conflict. *Cf. Miller v Fenton*, 474 U.S. at 116-117 (contrasting state court determinations of a defendant's competency to stand trial with voluntariness of confessions); *Harding*, 834 F.2d at 856-59 (discussing competency to waive counsel, on the one hand, and knowing and intelligent waiver on the other, in separate sections).

rights. A defendant is competent to waive counsel or plead guilty only if he has the capacity for "reasoned choice" among the alternatives available to him. *See Harding*, 834 F.2d at 856; *Evans II*, 800 F.2d at 887; *Chavez*, 656 F.2d at 518. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam); *Sieling*, 478 F.2d at 214. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. *See Evans I*, 705 F.2d at 1480; *Chavez*, 656 F.2d at 518; *United States v. Aponte*, 591 F.2d 1247, 1249 (9th Cir. 1978).

Our analysis of the order issued after the state postconviction hearing reveals

that the state court erroneously applied the standard for evaluating competency to stand trial, instead of the correct "reasoned choice" standard.

1.

In its order denying postconviction relief, the state court, in a single sentence, sought to resolve the question whether Moran had been competent to waive counsel. The court concluded that "[a]s to the claims of mentally incompetent to represent himself, the record clearly shows that he was examined by two psychiatrists both of whom declared defendant competent."

The reports to which the state court referred were both prepared to determine Moran's competency to stand trial, not his competency to waive constitutional rights. Dr. O'Gorman and Dr. Jurasky were appointed by the state court solely to consider Moran's competency to stand trial. Neither doctor considered the question whether Moran

was competent to waive counsel or to plead guilty. At the time of the examinations, Moran had not yet decided to do either, so the question of competency to waive constitutional rights was simply not before the doctors.[7]

[7] The conclusions of the psychiatrists were the sole support for the state court's postconviction ruling that Moran was competent to waive counsel. By relying solely on the psychiatrists' conclusions that Moran was competent to stand trial more than three years earlier, the state court applied the wrong legal standard for determining Moran's competency to waive his constitutional right to counsel.

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[7] Dr. O'Gorman interviewed Moran on September 12, 1984. Dr. Jurasky visited Moran on September 17, 1984. Moran waived counsel and pled guilty on November 28, 1984.

The state court did not articulate the standard of competency it used to evaluate Moran's contention that he was incompetent to plead guilty. As noted above, the state court's order denying postconviction relief contained but one reference to the standard of competency. That single reference is found in one sentence disposing of Moran's contention that he was incompetent to waive counsel. In that sentence, the court erroneously applied the standard for competency to stand trial, not the higher reasoned choice standard required to determine competency to make a valid waive of constitutional rights.

Because the state court order contained in a solitary reference to one standard of competency, we must assume that the state court applied that single standard in evaluating Moran's contention that he was incompetent to plead guilty as well as his

contention that he was incompetent to waive his right to counsel. We cannot conclude, therefore, that the state court applied the proper standard of competency to the question whether Moran was competent to plead guilty. *See Townsend v. Sain*, 372 U.S. 293, 315 (1963) (assumption that state court applied the correct legal standard is appropriate unless there is evidence giving reason to suspect that an incorrect legal standard was applied).

[8] In conclusion, the postconviction order issued by the state court does not constitute a valid finding that in November 1984 Moran was competent when he discharged his counsel and changed his pleas to guilty. The state court used the wrong legal standard to reach its conclusion that Moran was competent to waive counsel. That same erroneous standard of competency was applied when the state court concluded that Moran

failed to prove that his guilty pleas were involuntary.

B.

[9] Furthermore, when we examine the record in light of the correct legal standard, we must conclude that it cannot support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights.[8]

[8] Because the state court applied the wrong legal standard of competency, it would be inappropriate for us to infer from the record before us that the state court made additional factual findings necessary to support its legal conclusion. *See Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.) (When a state court rules after an evidentiary hearing, a federal district court assume that the state court found the facts necessary to support its ultimate legal conclusion "unless there is some indication that the state court applied an incorrect legal standard.") (citing *Townsend v. Sain*, 372 U.S. 293, 313-14 (1963)), *cert. denied*, 479 U.S. 867 (1986). If the state court had applied the correct legal standard of competency, we could have inferred, for example, that the court made a finding that Moran's behavior was unimpaired as one factor supporting an ultimate legal conclusion that he was competent to waive his constitutional rights.

In particular, the psychiatric evaluations on which the state court relied do not support the conclusion that Moran was competent to make decisions of such serious import.

Dr. O'Gorman evaluated Moran's competency to stand trial in September 1984, several months before Moran discharged his attorney and changed his pleas. Nor surprisingly, his report on Moran's mental condition focused only on those qualities that reflect competency to stand trial, not the higher level of mental functioning required for a valid waiver of constitutional rights.

Dr. O'Gorman concluded that "the patient [Richard Moran] is knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, if he so desires. He is fully cognizant of the penalties if convicted." Dr. O'Gorman

Psychiatric Evaluation at 2 (hereinafter "O'Gorman Report").

According to his report, Dr. O'Gorman perceived Moran to have a basic awareness of what was happening to him and of what had happened, though he also noted Moran's difficulty with his memory. *See* O'Gorman Report at 1. Dr. O'Gorman also commented that Moran was depressed and may not make the effort necessary to assist counsel in his own defense. O'Gorman Report at 3.

[10] These observations are relevant to the question whether Moran was competent to stand trial.[9] They are inadequate, however, to show that Moran was competent according to the higher standard of reasoned choice that the law requires for a defendant to make a voluntary, knowing, and intelligent waiver of constitutional rights.

Dr. O'Gorman's report is all the weaker as an indication of Moran's competency to waive his constitutional rights because it says nothing about the effects of any medication. Consequently, the report was inadequate to resolve Moran's contention that his heavily medicated condition rendered him incompetent to waive counsel.

Dr. Jurasky's report offers no additional evidence to indicate that Moran was capable of the reasoned choice necessary for the valid waiver of constitutional rights. Nothing in the Jurasky report speaks to the

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[9] Indeed, Dr. O'Gorman's evaluation of Moran is phrased in terms that accord almost identically with the standard applied to determine competency to stand trial. Dr. O'Gorman's evaluation of Moran mirrors the standard set out by the Supreme Court in *Drope*, 420 U.S. at 171, where the Court defined the constitutional standard for competency to stand trial as "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope* at 171. Dr. O'Gorman's perception that Moran was "fully cognizant" (continued...)

[9](...continued)
of the penalties he faced is also relevant to Moran's competency to stand trial to the extent that it indicates that Moran understood the nature of the proceedings against him.

effects of any medications on Moran. Like Dr. O'Gorman's report, Dr. Jurasky's observations about Moran's mental state were similarly couched in terms relevant to Moran's competency to stand trial. He discusses Moran's ability to aid counsel and assist in his defense, but says nothing pertinent to Moran's capacity for a reasoned choice among alternatives.

V.

For the reasons stated above, we reverse the judgment of the district court. We remand to the district court with instructions to issue the writ within 60 days unless the state court allows Moran to withdraw his guilty pleas, enter new pleas, and proceed to trial with the assistance of counsel.

REVERSED AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD ALLAN MORAN, CV-N-89-819-HDM
Petitioner,

vs.

WARDEN SALVADOR GODINEZ, et al.,
Respondents.
_____/

March 13, 1991

MEMORANDUM DECISION AND ORDER

HOWARD D. McKIBBEN, District Court Judge

Petitioner Richard Moran filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Moran challenges the validity of his guilty pleas to three counts of murder with a deadly weapon, two counts of robbery with a deadly weapon, and one count of arson. Moran was sentenced to two death sentences, a life without parole, and numerous years of imprisonment. Moran raises four issues in his petition: first,

he contends he was denied effective assistance of counsel; second, his guilty plea was not entered freely and voluntarily; third, the court erred in consolidating separate criminal incidents, resulting in separate indictments, into a single proceeding; and finally, the court did not properly weigh and consider aggravating and mitigating circumstances.

This court previously determined that Moran had failed to raise issues relating to the use of the underlying robbery as both a predicate for felony murder and as an aggravating circumstance for imposition of the death penalty in violation of his right to due process of law, and that §§ 175.554,[1] 200.030(4)(a)[2] and 200.033[3] violate the

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[1] § 175.554 involves instructions to the jury, determinations, findings, and verdict regarding penalty hearings for first degree murder proceedings.

[2] § 200.030(4) states: "Every person convicted of murder of the first degree shall be punished: (a) By death, only if (continued...)

eighth amendment. Moran was directed to exhaust those issues or withdraw them. See order at docket #37. Moran responded (#39) by withdrawing those issues.

FACTS

In the early morning hours of August 2, 1984, Moran and a companion, Tammy Cortez, entered the Red Pearl Saloon. Present in the bar were the bartender, Sandra Devere, and a customer, Russell Rhoades. Without provocation, Moran fatally shot Devere and Rhoades several times. He then instructed his companion to assist him in taking money from the premises. On August 11th, Moran went to the apartment of his former wife, Linda Vandervoort, and fatally shot her. He then shot himself in

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[2](...continued)
one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

[3] § 200.033 lists what may constitute an aggravating circumstances.

an attempted suicide. While recovering in the hospital, Moran confessed to the three murders.

On September 4, 1984, Moran appeared in the justice court and, against the advice of his attorney, he waived his right to a preliminary hearing regarding the murder of Vandervoort. The following day he again ignored advice from his attorney and waived his right to a preliminary hearing on the murder of Devere and Rhoades. A week later, Moran entered not-guilty pleas to all of the charges. On September 19th, and again on November 28th, two psychiatrists filed their separate competency reports, both finding Moran competent. Also on November 28th, Moran discharged his appointed counsel and entered guilty pleas to all of the charges, despite knowing that the state was seeking the death penalty on all three of the murder charges. On December 17th, the court asked

Moran in the following colloquy if he wished to withdraw the guilty pleas:

> THE COURT: Mr. Moran, on November 28, 1984, you informed the Court that it was your desire to proceed in these cases without the assistance of an attorney. I have previously advised you that it is unwise on your part not to have the assistance of an attorney to guide you and advise you through these proceedings. You have indicated to the Court that you do not even wish to have a standby counsel assist you. Since that hearing you have had time to think about your situation.
>
> Now, as I told you previously, the court cannot force a lawyer upon you if you insist that you want to proceed without the assistance of an attorney. I am of the opinion that you should be represented by an attorney. At this time, Mr. Moran, do you wish to reconsider and have the assistance of an attorney?
>
> THE DEFENDANT: No.
>
> THE COURT: NRS 176.165 allows a person to withdraw a plea of guilty before sentence is imposed. Do you understand that?
>
> THE DEFENDANT: Uh-huh.

THE COURT: Do you wish to exercise that right?

THE DEFENDANT: No, I don't.

Page 2-3, Exhibit 8, Docket #21. Moran thereafter informed the trial judge that he did not want to have any witnesses subpoenaed, nor standby counsel appointed, nor to have anyone investigate the possibility of mitigating evidence. On January 21, 1985, Moran was sentenced to a total of seventy-five (75) years on the robbery and arson charges. The same day the penalty hearing was conducted, the three-judge panel sentenced Moran to death on each of the three murder charges. On direct appeal, the Nevada Supreme Court reduced the death sentence for the murder of Vandervoort to life imprisonment without the possibility of parole.

INEFFECTIVE ASSISTANCE OF COUNSEL

In order to demonstrate ineffective assistance of counsel, Moran must meet the test established in Strickland v.

Washington, 466 U.S. 668 (1984), which first requires him to show that counsel's performance was deficient; i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." Id. at 690. Second, the test requires a showing that the "deficient performance prejudiced the defense"; i.e., that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." Id.

In applying the Strickland test, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. In

reviewing Moran's allegation, the court must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

In the event counsel erred in presenting Moran's defense, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. Moran must demonstrate that the error prejudiced the defense to compel a finding of ineffective assistance of counsel. Id. at 692. The appropriate test for prejudice is: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Moran proffers two reasons in support of his contention he was denied his right to the effective assistance of counsel. First, he claims that appointed counsel failed to assert any defense on his behalf, even though defenses, such as his inability to form the requisite intent to commit first degree murder, were viable. Moran contends that during the days preceding the two murders on August 2nd, he had been ingesting a substantial amount of drugs; as a consequence, he was incapable of forming the requisite intent to commit the murders, robbery and arson. Second, he asserts his counsel failed to move to suppress a drug-induced confession. He argues that he was under heavy medication when he confessed to the authorities in the hospital. He asserts the confessions were, therefore, not voluntary.

Moran raised these same reasons in a post-conviction proceeding. On appeal, the

Nevada Supreme Court rejected these arguments and concluded that Moran's counsel did discuss potential defenses with him and that any failure to discuss a specific defense did not fall below an objective standard of reasonable representation. See pages 1-3, Order Dismissing Appeal, Exhibit C, Docket #9.

Moran has not presented any evidence that would have been available to his counsel to show that on the day he killed Devere and Rhoades in the bar, he was mentally incapable of forming the intent to kill. The defendant at one point in the proceedings indicated he was ingesting "lotsa drugs" in the days prior to the killing. This conclusory statement is insufficient to establish that Moran's conviction is infirm, or that his counsel failed to provide him with effective representation. Moran has simply not met his burden of showing that on this issue he

was denied his right to the effective assistance of counsel.

Moran has also failed to show the medications that he was taking when he confessed in the hospital would have prevented him from making a voluntary statement. Counsel for Moran have argued what side-effects the types of medications generally have on individuals; they have not presented any evidence that at the time of the confession in the hospital, Moran was incapable of knowingly, intelligently and voluntarily giving a confession because of the medications. Furthermore, Moran confirmed the validity of the confessions during the hearing at which he entered his guilty pleas.

Thus, there is no reasonable probability that a new trial would have resulted in a different verdict given the weight of the evidence against Moran. As stated above, "[a]n error by counsel, even if

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Accordingly, Moran has failed to meet his burden of showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different"; that is, that there is "[a] reasonable probability . . . sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

VALIDITY OF THE GUILTY PLEAS

Moran alleges that his guilty pleas were not voluntarily entered, nor did the canvass conducted by the court comport with the requirements of Faretta v. California, 422 U.S. 806 (1975).

Voluntariness:

Moran contends he was under the influence of drugs at the time he entered his pleas. During the change of plea

hearing, he was asked whether he was "presently under the influence of any drug or alcohol," to which he responded saying, "Just what they give me in, you know, medications." Page 12, Exhibit A, Docket #9. At that hearing, and again during the post-conviction proceeding, the state trial judge found the pleas to have been voluntarily entered. Moran has not shown that those determinations are incorrect. Although he may have taken prescription drugs prior to the hearing, Moran has not presented any evidence to show that the effect that those medications actually had upon him were such that he was not able to freely and voluntarily decide for himself that he wanted to ignore the advice of his appointed counsel and change his plea to guilty. Moreover, the record does not reflect that the judge, the prosecutor, or the two attorneys initially appointed to represent Moran felt that his mental

faculties were impaired because of the medications he had consumed. Moran has simply failed to present sufficient evidence to meet his burden of showing that the pleas were not voluntarily entered. See 28 U.S.C. §2254(d).

Faretta Canvass:

A defendant has a constitutional right to proceed without counsel and represent himself in a criminal action. Faretta v. California, 422 U.S. 806 (1975). "'Because a defendant normally gives up more than he gains when he elects self-representation,' the district court is required to make 'reasonably certain that he in fact wishes to represent himself.'" United States v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990), citing Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). Accordingly, the law of this circuit has established two prerequisites to finding that the waiver of counsel is valid: the waiver must be unequivocal,

and it must be made knowingly and intelligently. Id. 913 F.2d at 714. This district is not unfamiliar with the right of self-representation and the requirements of Faretta.

> An accused has a sixth amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and is able and willing to abide by rules of procedure and courtroom protocol. McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S.Ct. 944, 949, 79 L.Ed.2d 122 (1984); United States v. Rylander, 714 F.2d 996, 1005 (9th Cir. 1983). Nevertheless, the trial judge may appoint standby counsel to assist the accused. McKaskle, 465 U.S. at 184, 104 S.Ct. at 954; United States v. Dujanovic, 486 F.2d 182, 187 (9th Cir. 1973).
>
> Before waiving his right to counsel, a defendant must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation. United States v. Rylander, supra at 1005; United States v. Harris, 683 F.2d 322, 324 (9th Cir. 1982).

Curry v. Slansky, 637 F.Supp. 947, 950 (D. Nev. 1986).

During the colloquy, the trial judge specifically advised Moran about the preclusive effect that discharging appointed counsel would have on the possibility of later asserting that he was denied the effective assistance of counsel.

> THE COURT: Does the defendant understand that should he waive his right to an attorney, that in all probability, you will not be able to complain at a later time that your right to the assistance of an attorney under the Sixth and Fourteenth Amendment to the United States Constitution were violated; do you understand that?
>
> THE DEFENDANT: Yes, I understand.

Page 8, Exhibit A, Docket #9. Later, the judge asked Moran whether he understood "the possible defenses to the charges in these cases" and whether he had "discussed these with the Public Defenders," to each of which Moran answered yes. Also, the judge asked Moran to indicate why he wanted to represent himself without the assistance of counsel. Moran stated, "Because we don't -- the

Public Defenders and myself don't agree on the way they should defend me. . . . I don't want them to present any mitigating evidence. I don't want this presented, and they have to -- they feel that they have to." Id. at page 11. And further:

> THE COURT: In other words, you do not want to have any -- put up any defense, in effect, is what you're saying?
>
> THE DEFENDANT: Correct.
>
> THE COURT: That you want to enter a plea to the matter and you do not want to present any mitigating circumstances whatsoever before the three-judge panel?
>
> THE DEFENDANT: Right.

Id. at page 11-12. Also, after the judge determined that Moran understood the meaning of standby counsel, Moran stated that he did not want such counsel appointed.

Moreover, simply because a colloquy was not perfect does not ipso facto invalidate the waiver.

> "The preferred procedure to ensure that a waiver is knowingly

> and intelligently made is for the district court to discuss each of the . . . elements with the defendant in open court," although a "limited exception may exist" where by the district court's failure to follow this procedure explicitly "will not necessitate automatic reversal when the record as a whole reveals a knowing and intelligent waiver." [United States v. Balough, 820 F.2d 1485], 1488 [(9th Cir. 1987)].

United States v. Robinson, 913 F.2d at 715. Accord, Curry v. Slansky, 637 F.Supp. at 950. ("However, the judge's failure to canvass a defendant with the proper thoroughness is not reversible error where the whole record supports the holding that the waiver was knowing and intelligent. In such a case, the defendant is not prejudiced by the inadequacy of the canvass.") Since a review of the entire record compels the conclusion that the waiver was knowing and intelligent, Moran cannot establish prejudice even if the canvass were inadequate in some way.

CONSOLIDATION OF THE TWO ACTIONS

Moran alleges that his constitutional rights were violated when a single penalty hearing was conducted for the separate criminal information. He consented to the consolidation during the December 17th hearing at which time he was given the opportunity to withdraw his guilty pleas. Page 4 of transcript in Exhibit 8, Docket #21. When this issue was raised on the direct appeal, the Nevada Supreme Court found it to be without merit. See page 6, Exhibit 18, Docket #21. There is no evidence in the record that Moran was prejudiced by the consolidation.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

Moran states three grounds for attacking the findings of the three-judge panel with respect to aggravating and mitigating circumstances: (1) whether the aggravating circumstances were sufficient to warrant the imposition of the death penalty; (2) whether the three-judge panel

erred in refusing to find as a mitigating circumstance his use of "lotsa drugs" prior to the two murders; and (3) whether the statutory scheme for weighing aggravating and mitigating circumstances is constitutionally infirm. Moran has withdrawn the third ground in light of the U.S. Supreme Court's recent decision in Walton v. Arizona, ___ U.S. ___, 110 S.Ct. 3047 (1990). Regarding the second ground, Nev. Rev. Stat. § 200.035 lists mitigating circumstances, the last of which states for "any other mitigating circumstance." The penalty hearing judges who found the existence or absence of aggravating and mitigating circumstances recognized that Moran had stated that he had been under the influence of drugs; however, they specifically stated that they did not find this to be a mitigating circumstance. Page 171, Exhibit 9, Docket #21. The sentencing panel was cognizant of the issue of drugs but

determined such facts did not qualify as a mitigating circumstance. The panel did not abuse its discretion under the facts of this case in reaching that conclusion.

The three-judge panel also did not err in determining that the aggravating circumstances support a sentence of death. The panel found two aggravating circumstances: the murders were committed at random and without apparent motive, Nev. Rev. Stat. § 200.033(9), and Moran created a risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, Nev. Rev. Stat. § 200.033(3). Both of these aggravating circumstances are supported by the record. Moran stated he had no idea why he killed Devere and Rhoades. Moran was seated next to his companion and Rhoades when he, Moran, started shooting. In Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985), the court found the existence of an

aggravating circumstance where the gunman shot the victim while the victim's wife lay on the bed near the line of fire.

Therefore, Moran's petition for writ of habeas corpus (#24) is DENIED.

It is so ORDERED.

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEVADA

RICHARD ALLEN MORAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 16300
RICHARD ALLEN MORAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 16301

March 31, 1987 103 Nev. 138, 734 P.2d 712

Appeal from judgments of conviction and three sentences of death in two consolidated cases; Eighth Judicial District Court, Clark County; Myron E. Leavitt, Michael E. Fondi, Peter I. Breen, Judges.

Defendant pleaded guilty to three counts of first degree murder, one count of first degree arson, and one count of burglary, and received three death sentences

for the three murders, in the district court. Defendant appealed. The Supreme Court held that: (1) there were no aggravating circumstances in murder of defendant's former wife, to support death sentence as to that murder; (2) evidence indicating that defendant killed two victims at saloon randomly and without motive was substantial, thus supporting finding of aggravating circumstance; and (3) fact that defendant reached around his companion to shoot victim, who was seated immediately to right of defendant's companion, was sufficient to support finding, as aggravating circumstance, that defendant knowingly created risk of death to more than one person.

Two death sentences affirmed (Appeal No. 16301); one death sentence modified to life imprisonment without the possibility of parole (Appeal No. 16300).

[Rehearing denied June 25, 1987]

Lovell, Bilbray & Potter, Las Vegas, for Appellant.

Brian McKay, Attorney General, Carson City; *Rex Bell*, District Attorney, *James Tuftland*, Deputy District Attorney, Clark County, for Respondent.

1. HOMICIDE.

Murder of defendant's former wife did not involve circumstances such as would justify finding of "depravity of mind," as aggravating circumstance; there was no indication of torture or sadistic acts performed by defendant and wife appeared to have died instantly with no disturbance to her body other than gunshot wounds. NRS 200.033, subd. 8.

2. HOMICIDE.

Evidence did not support finding of aggravating circumstance that murder of defendant's former wife was committed by person who knowingly created risk of death to more than one person; there were no other persons present in apartment when defendant shot his former wife and there was no evidence that any neighbor was at immediate risk of death or that defendant was aware of any other person within close proximity of crime scene. NRS 200.033, subd. 3

3. HOMICIDE.

Although death sentence for murder was not supported by aggravating circumstances, in light of overwhelming evidence of defendant's guilt, sentence of life imprisonment without possibility of parole would be imposed in place of death sentence. NRS 177.055, subd. 3(c), 200.030.

4. HOMICIDE.

Evidence indicating that defendant killed two victims at saloon randomly and without motive was substantial, thus supporting finding of aggravating circum-

stance; by his own admission, suicide notes, and in videotaped confession, defendant stated that he had no idea why he killed victims at saloon. NRS 200.033, subd. 9.

5. HOMICIDE.

Fact that defendant reached around his companion to shoot victim, who was seated immediately to right of defendant's companion, was sufficient to support finding, as aggravating circumstance, that defendant knowingly created risk of death to more than one person. NRS 200.033, subd. 3.

6. HOMICIDE.

Sentences of death for two murders were properly imposed and were not disproportionate to other cases involving similar circumstances; after killing two victims at saloon, defendant robbed and set fire to premises. NRS 177.055, subd. 2(d).

O P I N I O N

Per Curiam:

After a thorough canvass in the guilt phase of the trial in these two consolidated cases, Richard Allen Moran pleaded guilty to three counts of first degree murder, one count of first degree arson, and one count of robbery. At the penalty hearing in the first case a three-judge panel found that the simultaneous shooting deaths of a bartender and customer in a saloon had been committed under two aggravating circum-

stances and two mitigating circumstances. In the second case, for the separate and subsequent shooting death of Moran's former wife, the penalty tribunal found that murder also to have been committed under two aggravating circumstances with one mitigating circumstance. The tribunal found that the aggravating circumstances outweighed the mitigating circumstances in both instances and returned three separate sentences of death, one for each murder. Moran raises several assignments of error concerning the convictions and subsequent death sentences. The only error that warrants reversal is the penalty tribunal's finding of two aggravating circumstances in the murder of Moran's former wife. Moran was fairly convicted and sentenced to death for the other two murders.

On August 2, 1984, at approximately 4:30 a.m., appellant Richard Allen Moran entered the Red Pearl Saloon with Tammy

Cortez. The two took seats at the bar. The two other persons present were the bartender, Sandra DeVere, and Russell Rhoades, a customer. DeVere was located behind the bar immediately in front of and slightly to the left of Moran and Cortez. Rhoades was seated at the bar immediately to Cortez' right with Moran located to Cortez' left. Suddenly and without warning, Moran removed his eight-shot .45 caliber automatic pistol from his belt and shot DeVere four times. Moran then immediately reached behind Cortez and fired the remaining four rounds into Rhoades. Moran then told Cortez to go behind the bar and pick up the change located on the back counter. Unable to open the cash register, Moran carried it out to his vehicle. Moran then started several fires in various locations in the saloon. Moran and Cortez then left the scene.

Nine days later, on August 11, 1984, Moran went to the apartment of Linda

Vandervoort his former wife. Moran and Vandervoort had been divorced six to eight months before the shootings. Without provocation, Moran suddenly fired seven shots at Vandervoort, five of which entered her body. At least two rounds passed through a wall and entered an adjacent apartment, one of which shattered the glass top of a coffee table. The occupant of the adjacent apartment was not home at the time of the shooting. Moran then turned the weapon on himself firing the last round into his abdomen. Being unsuccessful at this suicide attempt, Moran attempted to slit his wrists but could not find a knife or other object sharp enough to accomplish the task. Police found Moran in the bedroom of Vandervoort's apartment upon their arrival. Initially, at the crime scene, Moran claimed the carnage had been performed by intruders. Two days later, however, while in the hospital, Moran summoned police in order to

make his confession. Moran first contends that the evidence does not support the findings by the penalty tribunal of aggravating circumstances necessary for imposition of the sentences of death under NRS 200.030 and NRS 200.033.[1]

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[1] NRS 200.030(4) provides, in pertinent part: "Every person convicted of murder of the first degree shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

NRS 200.033 delineates expressly nine of the aggravating circumstances which may be found in order to impose a sentence of death under NRS 200.030. The pertinent portions of NRS 200.033 which are at issue on this appeal read as follows:

> 200.033 Circumstances aggravating first degree murder. The only circumstances by which murder of the first degree may be aggravated are:
>
> . . . .
>
> 3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

(continued...)

Regarding the Vandervoort murder, the three-judge penalty tribunal found two aggravating circumstances: (1) depravity of mind, NRS 200.033(8), and (2) the murder was committed by a person who knowingly created a risk of death to more than one person by means of a weapon and course of action which was hazardous to the lives of more than one person. NRS 200.033(3).

[Headnote 1]

We agree with the appellant that Vandervoort's murder did not involve circumstances which justified a finding of "depravity of mind." The facts of this case do not exhibit depravity of mind as contemplated in NRS 200.033(8). The circum-

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[1](...continued)

> . . . .
>
> 8. The murder involved torture, depravity of mind or the mutilation of the victim.
>
> 9. The murder was committed upon one or more persons at random and without apparent motive.

stances of this murder were these: After talking with Vandervoort for a few minutes Moran asked her if she had read about the Red Pearl Shootings. As she turned to answer, Moran immediately began firing. There is indication of torture or sadistic acts performed by Moran. Vandervoort appears to have died instantly with no disturbance occurring to her body other than the gunshot wounds. As cold-blooded and malicious as the killing was, under the guidance given to us by the United States Supreme Court, we must conclude that the record does not support a finding of depravity of mind under NRS 200.033(8). Godfrey v. Georgia, 446 U.S. 420 (1970); Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979); *see also* Rogers v. State, 101 Nev. 456, 705 P.2d 644 (1985); Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985).

[Headnote 2]

We must also conclude that the evidence does not support the tribunal's finding that

Vandervoort's murder "was committed by a person who knowingly created a risk of death to more than one person. . . ." NRS 200.033(3). There were no other persons present in the apartment when Moran shot Vandervoort. *See* Nevius v. State, 101 Nev. 238, 669 P.2d 1053 (1985). There is also no evidence showing that any neighbor was at an immediately risk of death nor was Moran aware that any other person was within close proximity of the crime scene. *See* State v. Nash, 694 P.2d 222 (Ariz. 1985). The finding of the second aggravating circumstance in the Vandervoort murder under NRS 200.033(3) therefore cannot stand.

[Headnote 3]

Because neither of the aggravating circumstances in the Vandervoort murder can be sustained, the sentence of death in that case must be reversed. NRS 200.030. However, in light of the overwhelming evidence of Moran's guilt in Vandervoort's murder, a sentence of life imprisonment without the

possibility of parole will be imposed in place of the death sentence. NRS 177.055(3)(c).

Moran next contends that the evidence fails to support the aggravating circumstances found by the penalty tribunal in the Red Pearl Saloon murders.

The first aggravating circumstance found by the tribunal in the Red Pearl case is that the murders were committed upon one or more persons at random and without apparent motive. NRS 200.033(9). By his own admission, in his suicide notes and in his video-taped confession, Moran stated that he had no idea why he killed DeVere and Rhoades at the Red Pearl.

[Headnote 4]

Moran points to the inconsistency of this finding with the fact that Moran was also found guilty of robbery. This fact, Moran claims, provides a definite and apparent motive and therefore negates a finding of an aggravating circumstance under

NRS 200.033(9). However, in viewing the taped confession, when asked by the detective to describe the time at which he formed the intent to rob the saloon, Moran hesitated for a moment and then stated that he probably formed the idea the instant before the shooting. Although these facts may create some conflict, the evidence indicating that Moran killed the two victims at the saloon randomly and without motive is substantial; therefore, the evidence supports a finding of an aggravating circumstance under NRS 200.033(9). *See Deutscher v. State*, above.

Moran also attacks the finding of the second aggravating circumstance in the Red Pearl murders. Under NRS 200.033(3), the tribunal found that Moran knowingly created a risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person. This

finding was based on the fact that Tammy Cortez was seated next to Moran along with the victim, Rhoades, when Moran opened fire. [Headnote 5]

In *Nevius*, above, this court endorsed a finding of this aggravating circumstance where the gunman shot and killed his victim while the victim's wife lay on the bed near the line of fire. 101 Nev. at 243, 699 P.2d at 1056. The fact that Moran reached around Cortez to shoot Rhoades, who was seated immediately to the right of Cortez, is sufficient to support a finding that Moran "knowingly created a risk of death to more than one person." *Nevius v. State*, above; NRS 200.033(3).

Both aggravating circumstances found by the three-judge panel in the Red Pearl murders are soundly supported by the evidence; and, therefore, the two sentences of death for the killing of DeVere and Rhoades must stand.

We have carefully considered Moran's remaining assignments of error and conclude that they are meritless.

NRS 177.055(2)(d) requires this court to review a death sentence to determine whether the sentence is disproportionate to penalties imposed in similar cases throughout the state, taking into consideration the nature of the crime and the defendant.[2] [Headnote 6]

The record reveals that the Red Pearl murders were a senseless and mindless act of violence. During this same unexplained spree, Moran robbed and then set fire to the premises. Under these circumstances, and considering the relative weakness of the

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[2] Although subsection (d) of NRS 177.055(2) was eliminated as of June 6, 1985, as a requirement on appeal of death sentences, the prohibition against *ex post facto* laws requires that a proportionality review be done on this appeal since the murders occurred prior to June 6, 1985. Thompson v. State, 102 Nev. 348, 721 P.2d 1290 (1986).

mitigating circumstances,[3] we conclude that the sentences of death were property imposed and are not disproportionate to other cases involving similar circumstances. *See* Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985); Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985); Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985); Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985).

Accordingly, we uphold the two death sentences in Appeal No. 16301, and remand the Vandervoort case, Appeal No. 16300, for resentencing to life imprisonment without the possibility of parole.

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[3] The two mitigating factors found by the tribunal of the Red Pearl case were a lack of prior significant criminal history and Moran's remorse for the killing of DeVere and Rhoades.

APPENDIX D

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA Plaintiff, vs. RICHARD ALLEN MORAN, Defendant.	)	CASE NOS. C67482 and C67483 DEPARTMENT XII DOCKET R

MAY 10, 1988

ORDER DENYING POST-CONVICTION PETITION

MYRON E. LEAVITT, District Judge
Department XII

Petitioner entered pleas of guilty in these consolidated cases to three counts of first degree murder with the use of a deadly weapon, one count of first degree arson and two counts of robbery with the use of a deadly weapon. A three-judge panel was formed consisting of MYRON E. LEAVITT, District Judge; MICHAEL E. FONDI, District Judge; and PETER I. BREEN, District Judge,

and a penalty hearing on the murder charges was held January 21, 1985. Thereafter the panel returned three separate sentences for death for each victim. The defendant also was sentenced to fifteen years for the first degree arson, fifteen years for each robbery count and a consecutive fifteen years in each robbery count for the use of a deadly weapon in the crimes. All sentences were ordered to run consecutively for a total of seventy-five years.

A direct appeal was taken from the Judgments of Conviction and the three sentences of death. On March 31, 1987, the Supreme Court upheld the convictions and two of the death sentences and remanded Case C67482 for resentencing to life imprisonment without the possibility of parole.

Subsequently, on July 30, 1987, the defendant filed herein his petition for post-conviction relief pursuant to NRS 177.315 to 177.385 asserting that his pleas

of guilty were involuntarily entered and that he was denied the effective assistance of counsel. The petition was timely filed within one year from the final decision on appeal. NRS 177.315(3).

A hearing, pursuant to NRS 177.365, on the petition was held on April 20, 1988, and petitioner was informed pursuant to NRS 177.308(3) that all claims which challenge the conviction or imposition of the death sentences must be joined in his present petition and that any matter not included in the petition would not be considered in any subsequent hearing.

At the hearing the State was represented by DAN M. SEATON, ESQ., Chief Deputy District Attorney and the petitioner was represented by CAL POTTER, III, ESQ. The Court having heard the testimony of witnesses; listened to arguments of counsel, read the briefs on the law submitted herein,

and being fully advised in the premises, makes the following:

FINDINGS OF FACT

Defendant, was fully advised of his rights pursuant to the decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The defendant waived these rights and made a complete video-taped confession. At the time of the confession he was recovering from surgery and had been given morphine sulfate.

Defendant was on other medication at the time of the entry of his pleas. The medicine was given to defendant because he had suffered seizures as the result of his use of cocaine. At the time of the entry of the pleas, defendant was asked by the Court, "Are you presently under the influence of any drugs or alcohol?" Defendant replied, "Just what they give me in, you know, medication."

Defendant was informed by his Deputy Public Defender that he had no defense to the crimes and that they suggested he concern himself with the penalty phase of the murder cases. He then discharged his public defenders because he didn't want any mitigating circumstances presented and to make sure he received the death penalty.

On reflection, more than three years later, he now concludes that he was so under the influence of drugs at the time of his confession and the entry of the pleas that he has no recollection of his confession or statements made in court. He asserts the medication together with the statement by his public defenders that he had no defense made him want the death penalty.

The record clearly shows that defendant was thoroughly canvassed at the guilt phase of the trial. He knowingly and voluntarily waived his right to counsel and elected to represent himself. Faretta v. California,

422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

During the canvass, defendant indicated that he fully understood the proceedings. The Court made a specific finding that defendant understood the nature of the proceedings and the consequences of his pleas.

Prior to taking the defendant's pleas the defendant was examined as to his mental capacity and a report by a psychiatrist Dr. Jack A. Jurasky indicating defendant was legally competent, was filed in the case and made a part of the record. It was represented that a second psychiatrist, Dr. William D. O'Gorman, had reached the same conclusion. His report was subsequently made a part of the record in the case.

ISSUES PRESENTED

Defendant now claims that his pleas to the three murder charges were involuntary because: a) he was under the influence of

drugs at the time; and, b) he was mentally incompetent to represent himself.

He further states he was denied effective assistance of counsel in that his public defender failed to assert the defense that his confession was "drug-induced."

From the foregoing Findings of Fact and Issues Presented, this Court determines the following:

CONCLUSIONS OF LAW

VOLUNTARINESS OF PLEA

In reviewing the validity of a guilty plea the entire record of the case must be examined ". . . to determine whether the plea was valid, either by reason of the plea canvass itself or under the totality of the circumstances approach." Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). The guilty plea should be viewed as ". . . presumptively valid and the burden should be on the defendant to establish that the plea was not entered knowingly and intelli-

gently." Wingfield v. State, 91 Nev. 336, 535 P.2d 1295 (1975).

Here, The defendant did not present evidence as to the effect on him of any drugs he may have ingested prior to the entry of the plea. The defendant merely testified he was depressed and desired the death penalty. Such evidence is not sufficient to make a plea involuntary. See generally, Lizotte v. State, 102 Nev. 238, 720 P.2d 1212 (1986).

As to the claims of being mentally incompetent to represent himself, the record clearly shows that he was examined by two psychiatrists both of whom declared defendant competent.

Defendant has failed to meet his burden that the pleas were involuntarily entered.

INEFFECTIVE ASSISTANCE OF COUNSEL

The right to be represented by an attorney is fundamental and essential to be a fair trial and is guaranteed to one

accused of a felony under the Sixth Amendment to the United States Constitution.

In order for the right to be meaningful, the attorney representing the accused must be effective. The standard in measuring the attorney's performance is whether the accused received "reasonably effective assistance" from his counsel. Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

Before a claim by a convicted defendant of ineffective assistance of counsel can be successful in reversing or setting aside a conviction the defendant must prove, "first, that counsel's performance was deficient, and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

One who complains of ineffectiveness of counsel's assistance has the burden to

prove that such representation was not "within the range of competence demanded of attorneys in criminal cases," and ". . . fell below an objective standard of reasonableness." Strickland, supra.

He must "identify the acts of omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and a strong presumption exists that the attorney's "conduct falls within the wide range of reasonable professional assistance." Strickland, supra.

Even if the presumption is overcome, the convicted defendant must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra.

Here, defendant states the failure of the public defender to present the defense that his confession was "drug-induced" was ineffective assistance of counsel. He

claims his later confessions and statements at the entry of plea were given because the public defender told him he had no defenses.

There is no evidence as to the effect on defendant of the morphine sulfate given to him on the day of the confession. The video-taped statements were given after he had been informed of his rights and he voluntarily waived those rights. He subsequently repeated those confessions and statements in open court after again being advised of his rights.

Any failure to contest the video-taped confession was made moot by defendant's own acknowledgement of guilt at the plea hearing while acting as his own attorney. There is no showing that the result of the proceeding would have been different.

THEREFORE, by reason of foregoing, it is hereby

ORDERED, the Petition for Post-Conviction Relief be and the same is denied. It is further

ORDERED, that the stay of execution previously entered in this case is vacated. It is further

ORDERED, that a copy of this order be mailed forthwith to petitioner, RICHARD ALLEN MORAN, P. O. Box 607, Carson City, Nevada 89702, CAL POTTER, III, ESQ., Attorney for the Petitioner, 428 South Fourth Street, Las Vegas, Nevada 89101, DAN M. SEATON, ESQ., Chief Deputy District Attorney, Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada 89155, BRIAN McKAY, ESQ., Attorney General, Capitol Complex, Carson City, Nevada 89710, and GEORGE SUMNER, Director, Nevada Department of Prisons, P. O. Box 200, Carson City, Nevada 89702.

APPENDIX E

IN THE SUPREME COURT OF
THE STATE OF NEVADA

RICHARD ALLEN, Appellant, vs. WARDEN, NEVADA STATE PRISON, GEORGE SUMNER and THE STATE OF NEVADA, Respondents.	)	No. 19161

March 15, 1989

ORDER DISMISSING APPEAL

Appellant Richard Allen Moran pleaded guilty to three murders, two robberies and arson. A three-judge panel sentenced him to death for each of the three murders and to a total of seventy-five years in prison for the robberies and arson. We subsequently affirm two of the death penalties, but reduce the third to a life prison sentence without possibility of parole.

Following that appeal, Moran filed motions for post-conviction relief in which he claimed he was denied his right to the

effective assistance of counsel and that his guilty plea was involuntary. Moran now asserts that the district court erred in denying those motions. We disagree.

Moran bases his ineffective assistance of counsel claim on his assertion that his attorneys failed to pursue or advise him of potential defenses. Specifically, Moran argues that his counsel could have but did not argue that because Moran was under the influence of drugs, he could neither form the intent to commit first-degree murder, nor voluntarily confess to the murder.

After reviewing the record, we conclude that counsel's failure to advise Moran of these potential defenses did not fall below an objective standard of reasonable representation.

See Strickland v. Washington, 466 U.S. 668, 688 (1984). All of the psychiatric evidence available to the attorneys at the time Moran dismissed them, including the

opinion of Dr. O'Gorman,[1] indicated that Moran "could distinguish between right and wrong" and "understood the nature of his acts" when he committed the murders. In light of the evidence they had, Moran's attorneys cannot be faulted for failing to inform Moran at that time that the lack of intent defense may have been available in his case. Further, Moran's counsel cannot be faulted for failing to attempt to suppress a confession which we, in the earlier appeal of this case, concluded to be valid. See Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987).[2]

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[1] Dr. O'Gorman eventually issued a written report in which he concluded that Moran may not have been able to form the intent to kill because he was under the influence of cocaine.

[2] The validity of Moran's confession was one of the issues resolved in our statement that "we have carefully considered Moran's remaining assignments of error and conclude that they are meritless." Moran, 103 Nev. at 143.

Finally, a thorough reading of the record reveals that Moran's counsel did discuss potential defenses with him. During the canvass relating to his guilty plea, Moran admitted to the court that he not only understood the possible defenses to the charges he was facing, but he also had discussed those defenses with his attorneys. The fact that Moran's counsel advised him against changing his original not guilty plea also indicates that they planned on presenting a defense on Moran's behalf at the guilt phase of trial.

Even assuming Moran's attorneys were incompetent, Moran fails to show how the attorneys' failure to advise him of the defenses caused any prejudice. The record reveals that Moran dismissed his attorneys and chose to represent himself for the specific purpose of ensuring that no one presented defenses on his behalf. Moran now stands convicted of murder, not because his

attorneys failed to suppress his confession or advise him of a defense, but because Moran himself, contrary to his counsel's advice, elected to represent himself and enter a guilty plea. The fact Moran admitted during the plea canvass that he had discussed possible defenses with his attorneys belies his current contention that he would not have pleaded guilty had he known defenses were available.

Because Moran fails to show either attorney incompetence or prejudice attributable to such incompetence, there is nothing to support his claim that he did not receive his constitutionally guaranteed right to counsel. See Strickland v. Washington, 466 U.S. at 687.

With regard to the issue of the voluntary nature of Moran's guilty plea, we conclude that the thorough plea canvass and the "totality of the circumstances" surrounding the plea are sufficient to support

the district court's discretionary determination that Moran "knowingly and intelligently" pleaded guilty to the crimes in this case. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

Before accepting Moran's plea, the district court questioned Moran in detail regarding his understanding of the possible consequences of a guilty plea, the voluntariness of the plea, the elements of the charged crimes, the possible punishments, and his rights at trial and during the penalty phase. Although Moran did tell the court he was receiving medication at the jail, nothing in the record of the canvass in any way suggests that Moran was unable to comprehend what was going on, or that the judge needed to inquire further into the nature of the effect of the mediation. Moran presented no medical evidence in the post-conviction hearing which necessarily established that the medication influenced

him to such an extent that he was unable to understand the meaning and consequences of his plea.

Just as proof of an accused's intoxication does not, without more, prevent the admission of a confession, the evidence that Moran was on medication, standing alone as it does in this case, does not prevent the admission of his guilty plea. See Tucker v. State, 92 Nev. 486, 488, 553 P.2d 951, 952 (1976).

For the foregoing reasons, we hereby ORDER this appeal dismissed.

Supreme Court Justices:

Young
Steffen
Springer
Rose
Whitehead[3]

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[3] The Honorable Jerry C. Whitehead, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable John Mowbray, Justice. Nev. Const., art. 6, §4.

APPENDIX F

IN THE SUPREME COURT OF
THE UNITED STATES

RICHARD ALLEN MORAN, Petitioner, vs. HAROLD WHITLEY, Warden, Respondent.	)	No. 88-7520

October 2, 1989 110 S.Ct. 207 (1989)

Petition for writ of certiorari to the Supreme Court of Nevada.

October 2, 1989. Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

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No. 92-725

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

SALVADOR GODINEZ, Warden, Ely State Prison, Petitioner,	NV Sup. Ct. #19161
vs.	DC No. C67482 & C67483 Nevada (Las Vegas)
RICHARD ALLEN MORAN, Respondent.	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

SALVADOR GODINEZ, Warden, Ely State Prison, Petitioner,	)	NV Sup. Ct. #19161
vs.	)	DC No. C67482 & C67483 Nevada (Las Vegas)
RICHARD ALLEN MORAN, Respondent.	)	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CASES	PAGE
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OTHER	PAGE
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Golding, Roesch and Schreiber, Assessment and Conceptualization of Competency to Stand Trial, 8 Law & Hum. Behav. 321, 324, 333 n.2 (1984)	4
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II.

STATEMENT OF THE CASE

The Respondent, Moran, adopts the Statement of the Case set forth in Petitioner's Petition for Writ of Certiorari, with the exception to the Petitioner's characterization of State Trial Court Judge Myron Leavitt's plea canvass and Faretta canvass being extensive. In fact, his failure to conduct a Westbrook hearing[1] is the threshold issue of the Ninth Circuit Court of Appeal's opinion in this matter.

At the time of the Petitioner's plea and waiver of counsel, the Petitioner was still recovering from a suicide attempt and told the Court he was on medication. In fact, Moran was heavily medicated on the November change of plea and waiver of counsel court date. Nevertheless, the Court did not conduct any further inquiry into the type and dosage of the medications.

III.

STATEMENT OF FACTS

In the early morning hours of August 2, 1984, Richard Moran and a female companion entered the Red Pearl Saloon in Las Vegas, Nevada.

Present in the bar were the bartender, Sandra Devere, and another employee, Russell Rhoder, who was off-duty, sitting at the bar. Without any warning or apparent provocation, Moran . . .

[1] In Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed. 2d 429 (1966) this Court gave recognition to a distinction between a Defendant's mental competency to stand trial, and his competency to waive his right to counsel at trial.

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removed a .45 caliber automatic pistol from his belt and shot the bartender and the customer four times each.

Moran then carried the cash register from the bar outside to his vehicle and then set several fires inside the bar.

Nine days later, on August 11, 1984, Moran went to the home of his ex-wife, Linda Vandervoort, and again without apparent provocation, fired seven shots at her, five of which entered her body and caused her death.

Moran then turned the gun on himself and fired into his stomach after he had slashed his wrists.

At the time these acts occurred, Moran, an individual with no significant history of prior criminal history, was freebasing cocaine, ingesting quaaludes and drinking scotch. Moran was freebasing approximately two to three grams of cocaine a day.

On September 19, 1984 and on November 28, 1984, Dr. O'Gorman and Dr. Jurasky filed their respective psychiatric reports that Moran was competent to stand trial.

On November 28, 1984, Moran appeared before the honorable Myron Leavitt to change his plea to guilty to three capital murders and discharge his attorney. Moran further refused standby counsel and announced that he wanted no mitigating evidence presented on his behalf at his penalty hearing.

Moran expressed extreme remorse over shooting and killing the two people at the Red Pearl Saloon and the death of his ex-wife Linda Vandervoort.

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On November 28, 1984 at the time that Moran waived his counsel and plead straight-up to the charged offenses, the Court asked Moran if he was under the influence of drugs or alcohol. Moran answered in the affirmative. Incredibly, the Court did not ask any follow-up questions or conduct a competency hearing. Absolutely no further inquiry was made on the subject.

In January 1985 a three-judge sentencing panel sentenced Moran to death.

At the time of the post-conviction hearing in state court in April 1988, the jail medication records were admitted into evidence. The evidence showed that Moran was under the influence of four kinds of medication including Inderal, Dilantin, Phenobarbitol and Vistaril.[2]

Moran testified at the post-conviction proceeding that he was kept in a state of euphoria where he did not care what happened. Moran stated that he did not sober-up until he reached the Nevada State Prison when he was taken off of his medication.

Dr. O'Gorman also testified at the post-conviction hearing that Moran 's heavy usage of cocaine would have precluded . . .

---

[2] Inderal, commonly known as a "betablocker," is used in the management of hypertension. Physicians' Desk Reference (42d ed. 1988) at 650-52; Docket No. 26, Exhibit III (PDR excerpts). Dilantin is an antiepileptic drug which inhibits the spread of seizure activity in the motor cortex and is related to barbiturates in its chemical structure. Id. at 1543-45. Vistaril is used for the relief of anxiety and tension associated with psychoneurosis. It acts on certain key regions of the sub-cortical area of the central nervous system. Id. at 1625-26. Phenobarbital is a sedative generally used in conjunction with other drugs to counteract the central nervous system stimulation.

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him from forming the specific intent to commit the crime for which he was convicted.

Dr. O'Gorman further testified that he had not included this information in his report because the report was specifically limited to Moran's competency to stand trial.

IV.

ARGUMENT

I. There Is No Difference Between The Standards Of Competency To Waive Counsel And Plead Guilty But At Most A Disagreement On Terminology.

This Court should not grant certiorari merely to clarify what is at most a disagreement among the circuits over terminology. Although the Court of Appeals refers to its analysis of competence to waive counsel and plead guilty as a "standard", it is in fact nothing but the application of the Dusky standard, Dusky v. United States, 362 U.S. 402 (1960), to the particularly difficult and important decision being made by the defendant in the plea context.

The analysis of rationality under Dusky, is, and must be, intensely context-specific. All commentators analyzing the application of the Dusky standard have recognized that its requirement of rationality will have varying context depending on the character and complexity of the decision the defendant has to make. E.g., B. Ennis, Prisoners of Psychiatry: Mental Patients, Psychiatrist and the Law. 49 (1972); R. Roesch and S. Golding, Competency to Proceed: A Functional and Context-Determinative Decision, 29 J. Forensic Sci. 1119, 1123 (1984); Golding, Roesch and Schreiber, Assessment and Conceptualization of Competency to

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Stand Trial, 8 Law & Hum. Behav. 321, 324, 333 n.2 (1984); Schreiber, Professional Judgment in the Assessment of Competency to Stand Trial: Report of an Evaluation Study, 5 Intl. J. Law & Psychiatry, 331, 332-333 (1982); Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 Geo. Washington L.REv. 375, 378-379 (1985).

The degree of rationality demanded by the Dusky test for the defendant's competency at trial is appropriately keyed to the extent to which trial proceedings are in the hands of counsel. Counsel is afforded enormous latitude in making tactical decisions at trial, and the degree to which the defendant must be able "to consult with his lawyer with a reasonable degree of rational understanding." Dusky v. United States, 362 U.S. 401 (1966), relies upon the presence of competent counsel in the judicial proceedings. The decision to plead guilty, however, is significantly more serious: it dispenses altogether with the guiding hand of counsel, which is the main protection against erroneous conviction at trial; and it results in a conviction without any examination of the evidence. The decision to plead guilty thus requires not merely the ability to consult rationally with counsel in a proceeding in which counsel has a significant role. Rather, it requires the defendant to make a knowing and intelligent waiver of the right to have any protection at all, either through the trial process itself or through representation by counsel. This Court has recognized that a "hearing on the issue of [the defendant's] competence to stand trial" is not the same as an inquiry into

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"competence to waive his constitutional right to the assistance of counsel", because of the question whether the waiver is "intelligent and competent." Westbrook v. Arizona, 384 U.S. 150 (1966), quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

The Court of Appeals' analysis, in substance, is nothing more than the application of the Dusky rationality standard to the knowing and intelligent waiver requirements of Westbrook. Such a waiver does require a relatively complex assessment of the possible results of a trial; the benefits and burdens of undergoing a trial; the constitutional right to representation by counsel, confrontation and cross-examination of witnesses, judgement by an impartial jury, and all the other protection afforded by the trial process; and the consequences of foregoing all of those protections. The Court of Appeals' analysis of the defendant's ability to make a "reasoned choice" among the alternatives presented in the plea context is thus merely a restatement of the Dusky requirement that the defendant be able to function in a rational manner with a "rational as well as factual understanding" of the choices with which he is presented. The decision of the Court of Appeals therefore does not present a real conflict with any other decisions, and granting certiorari to resolve what is at most a terminological conflict is unwarranted.

II. The Issue Presented In The Instant Petition For Writ of Certiorari Was Not The Main Thrust of the Circuit Court's Opinion.

In his petition to this Court, Petitioner Godinez argues that the Ninth Circuit's heightened standard of mental

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competency when an individual waives his right to counsel and enters a guilty plea as compared to a hearing to determine competency to stand trial , requires review by this Court.

That issue was not the central rationale in the Circuit opinion.

Contrary to the Petitioner's contention, Moran has previously argued that Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973) and Chavez v. United States, U.S. 402, 50 S.Ct. 788, 4 L.ed.2d 824 (1960) applies to entry of plea, there is not a split about the need to determine competency to enter a plea of guilty and waive counsel.

The Circuit's action in the instant case, is but an extension of the Supreme Court's recognition in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) to the distinction between a defendant's mental competency to stand trial and his competency to waive his right to counsel at trial.

In, Sieling v. Eyman, 478 F.2d 211 (1973) the Ninth Circuit noted that it is well settled that a defendant in a criminal trial cannot be deemed to abandon any fundamental constitutional protection unless there is both "an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

In United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976) the Court recognized that the standard Rule 11 colloquy may prove an inadequate measure of the validity of a plea proffered by a defendant of questionable mental competence.

. . .

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Similarly in Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978) the Court in applying the Dusky standard held an evidentiary hearing noted that a guilty plea based on a rational decision to accept competent counsel's advise. Hence there is not a real qualitative difference between the Sieling standard and the Dusky standards.

Likewise the Court in United States v. Valentino, 283 F.2d 634 (1960) noted that, "A prisoner should not be permitted to plead guilty if his mental condition is such that he was unable to understand the proceedings before him.

The Court in United States Ex Rel. McGough v. Hewitt, 528 F.2d 339 (1975) noted that an evidentiary hearing should be conducted when questions arise about a petitioner's mental capacity, because the conviction of a person while he is legally incompetent violates due process. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Moreover, in Malinaukas v. United States, 505 F.2d 649 (5th Cir. 1974) although the Court embraced the Dusky standard for mental competence of an accused to voluntarily plead guilty , it also recognized that mere formalistic recitations regarding the voluntariness of a guilty pleas will not suffice.

In United States v. Harlan, 480 F.2d 515 (6th Cir. 1973) the Court acknowledged that a second inquiry into an accused's company is required if the Court is put on notice. In the instant case the Court was indeed put on notice and should have conducted a hearing.

. . .

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The Eighth Circuit likewise held a hearing to determine the competency to enter a plea. In adopting the Dusky standard stated that the issue is one of fact that can only be resolved by an evidentiary hearing. The factors used to determine issue of competency was not utilized in the instant case, i.e., testimony of prior attorneys.

In addition, the Tenth Circuit held that where evidence before the Court raises, a bona fide doubt as to defendant's competency to stand trial or enter a plea the Court must conduct a due process hearing to determine the competency for such purposes.

Most recently, the Eleventh Circuit case United States v. Simmons, 961 F.2d 183 (11th Cir. 1992) likewise looked to whether the plea colloquy provided the trial court with reason to suspect that he did not understand the Court's explanation of the consequences of pleading guilty.

In the case at hand the Court received ample warning that was separate and distinct from the competency to stand trail. There was a significant change from the prior analysis of competency. Mr. Moran had been medicated for Court.

In the context of this case, it is clear that under any standard of rationality the guilty plea and waiver of counsel cannot be considered knowing, intelligent and rational. It is undisputed that the defendant was medicated at the time of the plea, and that he had attempted suicide before his arrest. The psychiatric reports submitted did not address the issue of the defendant's ability to make rational judgments with respect to

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entry of a guilty plea or to waiver of counsel: neither report analyzed the effect of the defendant's long-term drug and alcoholic abuse and of its abrupt termination of his suicide attempt, or of his current medication, upon his ability to make rational choices; and the parts of the reports which expressed doubts about his ability to cooperate rationally with counsel or assist in his defense noted this problem specifically with regard to the defendant's state of guilty, remorse, and depression. See Strafer, Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology, 860, 862-863, 875, 885 (1983); cf.Lenhard v. Woolf, 443 U.S. 1306, 1311-1312 (1979) (Rehnquist, J., in chambers). The subsequent state court proceedings took no account of these factors in connection with the defendant's ability to decide rationally to forego the protection of a trial and representation by counsel, as opposed to the ability to function rationally at trial in cooperation with counsel. Thus whether the Court of Appeals was applying a differential standard to analysis of guilty pleas, or merely the context-specific Dusky standard, that decision would have to be affirmed by this Court. Accordingly, this case is not an appropriate vehicle for this Court to address the question of the appropriate standard, assuming arguendo that there is a conflict is the decisions which is not merely terminological.

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. . .

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V.

CONCLUSION

Respondent Moran submits that there is no qualitative difference in the Ninth Circuits' standard and the Dusky standard as applied in this case. The issue of this case is that due process requires a Court to initiate a competency hearing whenever it has or should have a good faith doubt about a defendants' competency to waive constitutional rights.

Counsel for the Petitioner's unprofessional comments about the Ninth Circuit Court of Appeals is inappropriate and should be struck from the record.

In addition, the Court noted that it is unclear whether the presumption or correctness extends to a state court's finding that a defendant is competent to waive constitutional rights. Creech v. Arave, 947 F.2d 873 (9th Cir. 1891).

For the reasons set forth above the Petitioner's petition for a writ of certiorari should be denied.

DATED this _____ day of November, 1992.

Respectfully Submitted,

POTTER LAW OFFICES

by _____
Cal J. Potter, III, Esq.
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VI.

APPENDIX

Excerpts from Appellant's Opening Brief to the Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD ALLAN MORAN, Appellant, vs. SALVADOR GODINEZ, WARDEN, Appellee.	Case Number: 91-15609 APPEAL FROM JUDGEMENT DENYING PETITION FOR WRIT OF HABEAS CORPUS ENTERED IN UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA

APPELLANT'S OPENING BRIEF

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RICHARD ALLAN MORAN

OFFICE OF THE ATTORNEY GENERAL

Frankie Sue Del Papa
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EVIDENCE DOES NOT SUPPORT THE FINDINGS OF THE AGGRAVATING CIRCUMSTANCES. 19

1. THE RANDOMNESS AGGRAVATING CIRCUMSTANCE IS UNSUPPORTED. 20

D. THE TRIAL COURT VIOLATED MORAN'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS IN REFUSING TO FIND THAT MORAN'S MENTAL AND EMOTIONAL STATE OF BEING UNDER THE INFLUENCE OF "LOTSA DRUGS" CONSTITUTED A MITIGATING CIRCUMSTANCE. 22

E. THE TRIAL COURT VIOLATED MORAN'S RIGHT TO DUE PROCESS BY CONSOLIDATING THE TWO UNRELATED ACTIONS AT THE PENALTY HEARING. 23

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requirements of due process of law, a guilty plea must be both voluntary and intelligent. Hill v. Lockhart, 474 U.S. 52 (1985).

Mental competency is basic to the ability of a defendant to enter a voluntary and intelligent plea of guilty. Matusiak v. Kelly, 786 F.2d 536 (2d Cir.), cert. denied, 479 U.S. 805 (1986). Stinson v. Wainwright, 710 F.2d 743 (11th Cir), cert. denied, 464 U.S. 984 (1983). This Court has previously held that a defendant is not competent to plead guilty if his mental state substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of the plea. Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973). Accord Chavez v. United States, 656 F.2d 512, 518-519 (9th Cir. 1981).

During his change of plea, Moran was asked by the trial court if he was "presently under the influence of any drug or alcohol." Moran responded, "Just what they gave me in, you know, medications." CR. 9, Exh. 8, at 12. The trial court neglected any further inquiry into either the type or dosage of medications Moran was referring to, nor saw fit to ask Moran if these prescribed medications were affecting him mentally or emotionally. Nevertheless, the court found Moran's pleas to have been voluntarily entered.

In fact, Moran was heavily medicated during the change of plea proceedings. Moran was taking the prescribed medications Phenobarbital, Dilantin, Inderal and Vistaril. CR. 9, Exh. B, at 34. At his post-conviction hearing, Moran testified that the medications caused his indifference during his change of plea, and

described the effects of these drugs as follows:

> I wouldn't know how to describe it. I guess I really didn't care about anything, you know, it wasn't -- I wasn't very concerned about anything that was going on, you know, as far as the proceedings and everything were going. CR. 9, Exh. B, at 35.

Even without a request from a defense attorney or the prosecutor, the trial court must order an evidentiary hearing to determine the accused's competency to stand trial when the evidence before it raises a reasonable doubt about the defendant's competency. See Chavez, supra.

The question thus becomes whether the trial court should reasonably have questioned Moran's competence when presented with the fact that Moran was medicated during the arraignment, was in the withdrawal stage of a serious drug addiction, had earlier attempted suicide, and was depressed.

Clearly the responsibility for confirming the competency of an accused who wishes to enter a plea of guilty rests in the hands of the trial court. This is so because it is unrealistic to expect a person heavily medicated with mood altering chemicals - prescribed or otherwise - to affirmatively volunteer to the trial court that his decision to enter a guilty plea may be merely the result of his medication, rather than his true intention. Richard Moran and other defendants who are unaware that they are of unsound mind at the time they enter a plea of guilty are precisely the individuals this procedural safeguard is designed to protect. Here, Moran's disclosure of his medicated condition demanded further inquiry by the trial court, yet the comment was simply ignored.

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By neglecting to determine the nature and effect of Moran's medication, the trial court failed to consider evidence which clearly would have raised a reasonable doubt as to Moran's competency. Moreover, the trial court's inexplicable disregard of Moran's medicated state throughout his proceedings has left Moran with little means of proving his prior incompetence at this late stage of his proceedings.

The district court has justified its finding of voluntariness on the fact that "Moran has not presented any evidence to show that the effect that those medications actually had upon him were such that he was not able to freely and voluntarily decide for himself that he wanted to ignore the advice of his appointed counsel and change his plea of guilty." CR. 48, at 8.

If this rationale is to be our guiding principle, and if this is the burden upon defendants we will allow trial courts to create through their own blunder, oversight or omission, then the professed protection of the incompetent accused is a hollow mockery of justice and fairness. In the instant case, Richard Moran is unfairly paying for the consequences of the trial court's error with his life.

Unconstitutional defect in Moran's plea is also demonstrated by the court's strained effort to obtain factual admissions from Moran regarding his commission of the subject crimes. Obtaining a factual basis is supposed to ensure that the court does not accept a guilty plea from a legally innocent defendant who is pleading guilty out of ignorance, feelings of

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VII.

CERTIFICATE OF SERVICE

I, Cal J. Potter, III, Esq., a member of the Bar of the Supreme Court of the United States and counsel of record for Richard Allen Moran, Respondent herein, hereby certify that on November 16, 1992, pursuant to Rule 33, Rules of the Supreme Court, I served copies of the foregoing RESPONDENT'S BRIEF IN OPPOSITION and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each of the parties herein, as follows:

On Salvador Godinez, Warden, Ely State Prison, Petitioner herein, by depositing such copies in the United States Post Office, Las Vegas, Nevada, with first class postage prepaid, properly addressed to the post office address of Frankie Sue Del Papa, Attorney General of the State of Nevada, Brooke A. Nielson, Assistant Attorney General, David F. Sarnowski, Chief Deputy Attorney General and Stuart J. Newman, Deputy Attorney General, the above-named Respondent's counsel of record, at Criminal Justice Division, Capitol Complex, Carson City, Nevada, 89710.

All parties required to be served have been served.

DATED November 16, 1992.

Cal J. Potter, III, Esq.
1125 Shadow Lane
Las Vegas, NV 89102

FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,
Petitioner,

v.

RICHARD ALLAN MORAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1992
CERTIORARI GRANTED DECEMBER 14, 1992

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Opinion - published by the Nevada Supreme Court as 103 Nev. 138, 734 P.2d 712 (1987)	Appendix C to petition for writ of certiorari
Order Denying Post-Conviction Petition, issued by the Eighth Judicial District Court of the State of Nevada, filed May 10, 1988	Appendix D to petition for writ of certiorari
Order Dismissing Appeal, issued by the Nevada Supreme Court, March 15, 1989	Appendix E to petition for writ of certiorari
Order - issued by the United States Supreme Court as 110 S.Ct. 207 (1989), denying petition for writ of Certiorari	Appendix F to petition for writ of certiorari

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
Clerk of the Court

AREA CODE 202
479-3011

December 14, 1992

Stuart J. Newman, Esq.
Deputy Attorney General of Nevada
Capitol Complex, Justice Division
Carson City, Nevada 89710

Re: 92-725 - Salvador Godinez, Warden
v. Richard Allan Moran

Dear Mr. Newman:

The Court today entered the following order in the above stated case:

"The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

Enclosed are Memoranda describing the time requirements and procedures under the Rules, together with a Specification Chart for your use.

Please note that this case will be argued in the March Session. Requests for extensions of time to file briefs on the merits

are not favored. The deferred appendix method may not be used.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Assistant Clerk

Enclosures

Psychiatric Evaluation of
Jack A. Jurasky, M.D.

(letterhead information deleted in printing)

September 19, 1984

Office of the Public Defender
309 S. Third Street, Suite 226
Las Vegas, Nevada 89155

Attn: Robert L. Miller, Deputy

Re: Psychiatric Evaluation of
Richard Allen Moran
(JC # 3083 84F)

Gentlemen:

Richard A. Moran, 30, was interviewed on September 17, 1984, at the Clark County Jail where he is being held on multiple charges of Murder, events alleged to have occurred during the month of August 1984, in two separate events. The first of these is said to have been perpetrated on August 2, 1984, taking place at the Red Pearl Bar and involved the death of a man and a woman. Later on August 11th, this defendant is charged with the homicide of his ex-wife. I am in possession of copies of a large number of records including the discovery,

information, and voluntary statements made by the defendant himself on separate occasions.

The defendant, a nice-looking young man, appearing his stated age, sat opposite me throughout the interview apparently quite willing to discuss the case with me. He informed me that he has lived in Las Vegas for about 6 years coming from New York. He has been working here as a bartender and enjoyed that type of work. In New York, he was involved in the construction industry, primarily as a roofer. His only marriage was to the victim. He has a high school education and has never been in the military. He acknowledged to me that he has been charged with three counts of murder as well as arson, and two counts of armed robbery. He made no attempt to explain or excuse himself other than to state that he had been using cocaine very heavily for many months and two weeks prior to these inci-

dences had been free-basing. He told me that he had no prior criminal record but he got so involved in cocaine that "I just had to get more and more of it. I even lost a job about it." He told me that he had divorced his wife last October, not because of cocaine, but because he had been drinking excessively. Even though they were divorced, he felt that their relationship was amicable. The precipitant of the divorce was the fact that she was seeing another man after having become increasingly disturbed by his uncontrolled drinking. As to the murders themselves, the defendant claims to have little logical or consistent recall. He states "I have visions of myself pointing the gun at the victims, but I can't see them. I can see my wife's dead body, but I can't see myself." Other than that, he has spotty recollection of events after the police picked him up. He does recall attempting to make some sort of story to

account for his self-inflicted bullet wound by accusing others, but gave those stories up as he began to come down off his drug intoxication which ultimately led to his confessions and statements.

He was willing to talk to the best of his ability about the homicides in the bar, but all he could state was "I don't even know what those poor two people in the bar look like. I can only see myself holding the gun."

He has never been a patient in a mental hospital or felt the need for psychiatric treatment although he admits he has always drank alcohol heavily. "Almost continuously with a lot of amnesia about my drinking. Finally, I had a seizure in February 1984 and stopped drinking. It was then that I got started on the cocaine."

The defendant's general attitude and behavior were quiet cooperation. He manifested no hostility nor in any way did he

attempt to excuse himself or justify his behavior. The stream of thought was fluent and the content at all times was relevant, goal directed, and material. Affect was depressed but appropriate. Mood was sad and moderately depressed. He wept on two occasions when talking about the victims. He denies the existence of hallucinations or delusions. He did say "I had one experience in which I thought they changed my hospital room when actually I was just coming down from my high." His memory at the present time seems to be grossly intact for recent and remote events except for when under the heavy influence of alcohol or cocaine. He states "I can only remember little things and they are not always connected." He is at the present time well oriented as to time, place, and person. His capacity to pay attention and to concentrate is good as manifested by his ability to subtract 7's from a hundred serially quickly

and without error. I estimate his intelligence to be at least normal if not slightly superior. Insight is limited to an awareness of his involvement and addiction to drugs. Judgment at the present time is within normal limits.

There is not the slightest doubt in my mind that the man I interviewed in the jail on this date was in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so. The only difficulty would be his difficulty in recalling relevant material while he was under the influence of either alcohol and/or cocaine. Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense but I do not feel that it is necessarily a major consideration. It is

the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy.

I feel this is a tragic case that involved the death of three people and the ruination of a fourth and presents a severe indictment to anyone who would argue about the deadly and addictive qualities of cocaine abuse.

Sincerely,

/s/ Jack A. Jurasky
Jack A. Jurasky, M.D.

JAJ/mp

Psychiatric Evaluation of
William D. O'Gorman, M.D.

(letterhead information deleted in printing)

November 28, 1984

Psychiatric Evaluation
Case #JC 3083-84F
Richard Allen Moran
Date of Examination: 9/12/84
Place: Clark County Jail
Time: 8:00 p.m. to 8:51 p.m.

CHIEF COMPLAINTS:

The patient stated that he is aware he is being charged with 1st degree murder. He stated that he does not recall, specifically, shooting two people in the bar, but he is fully aware of the circumstances, which he claimed he learned later. He stated, that following the knowledge that he gained from this, two days later he decided to kill himself, and expressed no particular worry, regarding this.

It was his decision, that he would kill his ex-wife, before he shot himself, in order that she would be with him, when he died, and he would not be alone. He also

reported that he has been depressed, "I'm not a nice guy, anymore".

HISTORY OF PRESENT ILLNESS:

The patient reported that he has a long history of drug abuse, starting at the age of 14, when he began to take LSD. He reports a 100 times, he has had trips, but never a bad one. At 15, he started drinking. He did acknowledge, that he began the steady use of cocaine in 1983. By February the 5th, 1984, he lost his job at the Bingo Palace, after having been employed there for 5½ years, because of a change in his personality. He stated that he had subsequently been a heavy user of cocaine, and experimented with all sorts of drugs. "My whole life has been drugs."

He stated that he has used much speed, and would go two and three days, without sleep. This particular reference to the use of cocaine, which he has free-based. He reported that approximately 10 days prior

to the incident in the Red Pearl Bar, he was a heavy user of cocaine and used as much as he could get his hands on. He stated that he used up all his money, spending it on cocaine. He stated that he has a severe need, to continue to use it.

He did report that he shot himself, in the abdomen, with a pistol, and was surprised that he would live. He reported the incident of the murder of two people, as August the 11th of 1984.

HISTORY OF PAST ILLNESS:

The patient stated that he had mumps in childhood. He had an episode, in which he had incontinence of urine, in February, 1984. He also reported that he had a "seizure" in jail, on August 28, 1984, also manifested by loss of control of bladder. He has had an injury to a knee cartilage, when he was 15, no surgery. He believes he has arthritis in his right knee.

FAMILY HISTORY:

He was born in Big Springs, Texas, 2/7/54. The family moved to Niagara Falls, New York for 23 years. He came to Las Vegas, with a friend of his, to look for work.

His father is deceased, age 55, cancer of the lung and stroke, with a heart attack. He had been employed by the New York Central Railroad. His mother is age 53, alive and well, lives in West Palm Beach, with a son, is a waitress and companion. He stated that his parents divorced, when he was age 14, they had trouble for several years, prior to the divorce. His reaction to this, was that he cried.

He has two brothers, age 33 and 24. The older is in good health, a psychiatric nurse at Cleveland Clinic, Cleveland, Ohio. His younger brother is single, works in a factory and lives with his mother in Florida. He has three sisters, 34, 32 and 25, all are

married and in good health. The oldest is a homemaker in Detroit, the middle sister is a homemaker in West Palm Beach, and the youngest sister is manager of a bar in Moscow, Idaho. He reports that he had a happy childhood.

SCHOOL HISTORY:

He stated that he had trouble spelling, in school. He graduated from high school, at 18, in 1972. He was a C student.

NORMAL PERSONALITY:

A normal personality described by the patient. He states that he has always been easy going and had a quick wit. He would make permanent friends. He was good humored, sensitive, he denies ever being quick tempered. He was always easy-come, easy-go. He denies being a worrier, he was never moody. He reports that he has been polite and well mannered. He did state, that if he were drinking, he would do things and black out at times. This he observed

in the past two to three years. He would also describe episodes of violence when he was drinking.

MARITAL HISTORY:

He married the first time, at the age of 28, October 17, 1982, his bride was 24. He divorced her in September of 1983, he did not know why, but it was a mutual agreement. He reported that his wife was born in Las Vegas, had one year of college and was a cocktail waitress. He stated that she used drugs with him, such as pot and ludes.

RECREATIONAL HISTORY:

He stated that he enjoyed gun collecting and target shooting; flying, camping and four-wheel drive. He was a rock hunter. He did very little reading.

MENTAL EXAMINATION:

Appearance: This is a 30 year old, divorced, Caucasian male.

Stream of Mental Activity: He was quite factual and open, but very depressed and

showed much tearing in talking about the episodes that led up to his present incarceration, particularly in talking about his ex-wife.

Emotion: Depressed.

Content of Thought: The patient is knowledgeable that he is being held on a 1st degree charge of murder. He stated that at the time of the shooting at the Red Pearl, he did not remember the events, because he had been drinking excessively, and was high on cocaine. He did realize what had happened, two days later, and decides to kill himself. He claimed he was not worried. Before he decided to shoot himself, he intended to kill his ex-wife, which he did, and then layed [sic] down on the bed, and shot himself, in the abdomen. Subsequent to his arrest, he has acknowledged the abnormalities of his behavior, and he expresses a desire to accept capital punishment.

PSYCHOLOGICAL TESTS:

An organic integrity test revealed 75% form, 25% color a measurement of anxiety, without disorganization.

Other psychiatric tests were not administered to him on the date of the examination.

It is the opinion of this examiner, that the patient is knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, if he so desires. He is fully cognizant of the penalties if convicted.

Respectfully yours,

/s/ William D. O'Gorman M.D.
William D. O'Gorman M.D.

WDO'G: nh

Case No. C67482
Dept. No. XII

IN THE EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff, vs. RICHARD A. MORAN, Defendant.	REPORTER'S TRANSCRIPT OF PLEA

Filed: February 5, 1985

BEFORE THE HONORABLE MYRON E. LEAVITT,
DISTRICT JUDGE

Wednesday, November 28, 1984
1:30 o'clock p.m.

APPEARANCES:

For the State: THOMAS LEEN, ESQ.
Deputy District Attorney

For the Defendant: ROBERT MILLER, ESQ.
and
JAMES GUBLER, ESQ.
Deputy Public
Defenders

Reported by: LAURIE H. WEBB
Official Court Reporter
C.S.R. No. 50

LAS VEGAS, CLARK COUNTY, NEVADA,
WED. NOVEMBER 28, 1984

1:30 o'clock P.M.

-oOo-

P R O C E E D I N G S

THE COURT: This is Case No. 67482 and Case No. C67483, the State of Nevada versus Richard A. Moran.

Let the record show the presence of the defendant in custody.

Let the record also show the presence of the Public Defenders in this case, Mr. Miller and Mr. Gubler.

Let the record also show the presence of the Deputy District Attorney, Mr. Tom Leen.

It is my understanding that the defendant desired to withdraw his previous plea of not guilty in these cases and enter a plea of guilty to all counts in both cases; is that correct?

THE DEFENDANT: That is correct.

THE COURT: And I also understand that the defendant desires to discharge the

public defender and waive his right to the assistance of an attorney in these proceedings; is that correct?

THE DEFENDANT: Yeah.

THE COURT: Did the Public Defender's Office conduct a investigation as to the competency of this defendant?

MR. GUBLER: We did, your Honor. On September 19, the defendant was interviewed by Dr. Jurasky who prepared a report, which I've provided the Court a copy of that report, as well as Mr. Leen.

Basically what he finds in there is that the defendant is competent to stand trial.

Also, he was interviewed by Dr. O'Gorman on or about that same date of September 19. That report has not been prepared yet.

I've spoken to Dr. O'Gorman and his findings are similar to Dr. Jurasky's, that he is competent to stand trial and that at the time of these alleged incidences, he

could distinguish between right and wrong and also understood the nature of his acts.

THE COURT: The report from Dr. Jurasky will be made a part of the record in this case.

The Court has read the report of Dr. Jurasky and based upon the representation by the Deputy Public Defender regarding Dr. O'Gorman's findings, the Court at this time finds that the defendant is competent in that he knew the nature and quality of his acts, had the capacity to determine right from wrong; that he understands the nature of the criminal charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter; that he knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney.

Now, at this time, Mr. Moran, I'm going to inform you that under the Sixth and Fourteenth Amendment to the United States Constitution and Article 1 Section 8 of the Nevada State Constitution, you are guaranteed the right to the assistance by an attorney at all stages of a criminal proceeding before you can be validly convicted and punished.

The defendant does have the right to represent himself in a criminal case and manage and conduct his own defense. He has the basic right to defend himself if he truly wants to do so.

The Court cannot force a lawyer upon you if you insist that you want to conduct your own defense. But you must knowingly and intelligently waive your constitutional right to the assistance of counsel.

You must be made aware of the dangers and the disadvantages of self-representation.

The criminal justice system is not available to you as an instrument of self-destruction, but it does not prevent a defendant from acknowledging guilt when fully advised of all of its implications and capable of understanding them.

Let me point out to you first, Mr. Moran, that I think it would be a very serious mistake on your part to discharge the public defender and waive your right to assistance of an attorney in these cases.

I'm going to explain to you some of those disadvantages. As I stated to you earlier, you have the right to the assistance of an attorney at all stages of these proceedings.

Criminal law is a complex area where experience and professional training is required and desirable. An attorney is trained in the law, has the skill and experience to properly conduct a defense to criminal charges. An attorney can properly weigh the factors involved in the guilty

plea as opposed to submitting the case to a jury.

An attorney knows all of the elements in an offense and can determine by discovery and investigation if, in fact, the offense was committed.

An attorney knows the possible defenses that may be presented on a defendant's behalf and by the use of these defenses may be able to prove you innocent.

Trials present hard choices as to strategy and to tactics, and even attorneys can differ as to the proper defense to make. An attorney knows the degree of proof that the State must meet to find you guilty.

The State must prove you guilty beyond a reasonable doubt. An attorney, by investigation and review of the State's evidence, may determine that the State cannot prove it's case and, therefore, you cannot be convicted.

You must follow all of the legal rules involved in the criminal proceedings even though you may not know them. And you alone must argue your case before a three-judge panel, should you plead guilty, or before a judge, should you plead guilty.

Do you know that the sentence in this Case No. C67482 and to the two charges in the other case is the death penalty?

THE DEFENDANT: Uh-huh.

THE COURT: You understand that?

THE DEFENDANT: Yeah.

THE COURT: Do you understand that the State has filed a notice in both cases that they will seek the death penalty?

THE DEFENDANT: Yeah, I do.

THE COURT: You're aware of that?

THE DEFENDANT: Uh-huh.

THE COURT: Do you know that you have a right to a speedy and public trial by an impartial jury, free of any pretrial publicity at which time it would be the

burden of the prosecution to prove your guilt beyond a reasonable doubt?

Do you understand that?

THE DEFENDANT: Yeah, I understand.

THE COURT: You also know that you may disqualify jurors who are biased against you, and that you can disqualify eight prospective jurors without any cause or reason; do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand that an attorney is trained and qualified to determine whether or not if a juror may be biased against you?

Do you understand that you have the right to be confronted by witnesses against you and have the right to cross-examine those witnesses and that an attorney is qualified and trained to conduct such a cross-examination?

THE DEFENDANT: Yeah, I understand.

THE COURT: Do you understand that you have a right to compel witnesses by court order to attend and testify on your behalf? Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand that you have the right to argue your case to a jury or a three-judge panel and that an attorney is trained to present effective arguments to a jury or to a judge; and you understand by not having an attorney, you will not have that person skilled to represent you?

THE DEFENDANT: Yeah, I understand.

THE COURT: Do you understand that you have a right to testify on your own behalf but you're not required to do so; and should you not testify, the prosecution cannot comment upon that fact in its argument to the jury and such a decision on whether or not to testify is better left to one trained and skilled in the law; do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Does the defendant understand that should he waive his right to an attorney, that in all probability, you will not be able to complain at a later time that your right to the assistance of an attorney under the Sixth and Fourteenth Amendment to the United States Constitution were violated; do you understand that?

THE DEFENDANT: Yes, I understand.

THE COURT: Once you decide on self-representation, you may not change your mind in the middle of the proceedings; do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand the nature of the charges that have been brought against you?

THE DEFENDANT: Yes.

THE COURT: Have you discussed these with the Public Defenders?

THE DEFENDANT: Yes.

THE COURT: Do you understand the statutory offenses that are included within the charges and that you could possibly be found guilty of a lesser included offense?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand the possible defenses to the charges in these cases?

THE DEFENDANT: Yes.

THE COURT: Have you discussed these with the Public Defenders?

THE DEFENDANT: Yes, I have.

THE COURT: Does the defendant understand the aggravating circumstances set forth in NRS 200.033 and the right to present mitigating circumstances as set forth in NRS 200.035?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand that in the case where there is an intention on the part of the State to seek the death penalty, that

you have a right to present mitigating circumstances under Nevada law?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Do you understand that an attorney can research the law for similar cases and present possible defenses based upon those materials?

THE DEFENDANT: Yes, I do.

THE COURT: How old are you?

THE DEFENDANT: Thirty.

THE COURT: What is your education?

THE DEFENDANT: High School.

THE COURT: Do you understand, read and write the English language?

THE DEFENDANT: Uh-huh.

THE COURT: What has been your prior court experiences?

THE DEFENDANT: None.

THE COURT: Has anybody made any inducements, promises or threats towards you?

THE DEFENDANT: Uh-uh.

THE COURT: Do you understand that the assistance of an attorney would not be a financial burden upon you?

THE DEFENDANT: Yeah, I know.

THE COURT: That the attorney will be paid-- will be furnished to you without any expense to you?

THE DEFENDANT: Uh-huh.

THE COURT: Do you understand the seriousness of these charges?

THE DEFENDANT: Yes.

THE COURT: Now, I know that since you've never had any prior court experience, you do not have knowledge of the legal proceedings and you originally pleaded not guilty in this case.

THE DEFENDANT: Right.

THE COURT: Would you state to the Court the reasons why you have elected to represent yourself.

THE DEFENDANT: Because we don't-- the Public Defenders and myself don't agree on the way they should defend me.

THE COURT: Well, how do you believe you should be defended?

THE DEFENDANT: I don't want them to present any mitigating evidence. I don't want this presented, and they have to -- they feel that they have to.

THE COURT: In other words, you do not want to have any -- put up any defense, in effect, is what you're saying?

THE DEFENDANT: Correct.

THE COURT: That you want to enter a plea to this matter and you do not want to present any mitigating circumstances whatsoever before a three-judge panel?

THE DEFENDANT: Right.

THE COURT: Are you presently under the influence of any drug or alcohol?

THE DEFENDANT: Just what they give me in, you know, medications.

THE COURT: In the event that I should discharge the public defender in this case, do you wish the Court to appoint standby counsel to assist you, if and when you may request help?

Do you understand what standby counsel is?

THE DEFENDANT: Yeah.

THE COURT: In other words, I would appoint an attorney to sit in the audience during all these proceedings and should you desire their help, they would be available.

Do you wish to have the Court appoint standby counsel?

THE DEFENDANT: I don't think I'll need one.

THE COURT: Do you wish the Court to appoint an attorney to gather any mitigating

circumstances to present to the Court or panel of judges on your behalf?

THE DEFENDANT: No, I don't.

THE COURT: The public defender will be allowed to withdraw.

Do you wish to make any statement for the record, Mr. Gubler or Mr. Miller?

MR. GUBLER: I don't believe so, your Honor. I think the Court has covered it well and if we are permitted to withdraw, we'll leave the table at this time.

THE COURT: I understand that he's doing this against your advise [sic]?

MR. GUBLER: That is correct, your Honor.

THE COURT: All right. Mr. Moran, in regards to the entry of plea, are you ready to enter a plea to these cases at this time?

THE DEFENDANT: Yes.

THE COURT: Would you once again please state your age.

THE DEFENDANT: Thirty.

THE COURT: And will you please relate to the Court the extent of your education?

THE DEFENDANT: I graduated from high school.

THE COURT: You then do read, write and understand the English language?

THE DEFENDANT: Yes.

THE COURT: You have been previously provided with true copies of the Information in Case No. C67482 and Case No. C68483 wherein you have been charged as follows:

In Case No. C67482, you have been charged with murder with the use of a deadly weapon.

In Case No. C67483, you have been charged with five counts. Count I, murder with the use of a deadly weapon; Count II, murder with the use of a deadly weapon; Count III, robbery with use of a deadly weapon; Count IV, robbery with use of a deadly weapon; and Count V, first degree arson.

You have previously entered a plea of not guilty to the charge in Case No. C67482 and

not guilty to all five counts in Case No. C67483.

Do you now wish to withdraw those pleas of not guilty?

THE DEFENDANT: Yes, I do.

THE COURT: The pleas of not guilty previously entered herein are hereby withdrawn.

Do you understand the nature of the charges contained in both of the Informations?

THE DEFENDANT: Yes.

THE COURT: And have you discussed these charges with your previous attorneys?

THE DEFENDANT: Yes, I have.

THE COURT: Before you enter a plea today, again, I will advise you that the State will seek the death penalty as to the murder charges in both of these cases.

Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: As to Case No. C67482, does the defendant have a copy of that Information.

MR. LEEN: I think his previous counsel has one, but I'll give him another one.

THE COURT: Here's a copy. Would you furnish him with a copy.

Let the record show that the defendant is being furnished with a copy of the Information in Case No. C68482 [sic].

In that case, Mr. Moran, you're being charged with murder with the use of a deadly weapon, a felony. How do you plead to the charge; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: In Case No. C67483, do you have a copy of the Information in that case?

THE DEFENDANT: Uh-uh.

MR. LEEN: I'm giving him right now, Judge.

THE COURT: All right. You now have a true copy of the Information in Case No.

C67483 in which you have been charged with five counts.

In Count I, you have been charged with murder with the use of a deadly weapon. How do you plead; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: As to Count II, murder with the use of a deadly weapon, how do you plead; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: As to Count III, robbery with the use of a deadly weapon, how do you plead; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: As to Count IV, robbery with the use of a deadly weapon, how do you plead; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: As to Count V, first degree arson, how do you plead; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Before I can accept your pleas of guilty, I must be satisfied that your pleas are freely and voluntarily given and that you fully understand the nature of the charges against you and the consequences of such a plea.

Now, Mr. Moran, you may sit down. This will take a little while.

Do you make the pleas in these cases freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Have any threats been made against you or anyone closely associated with you in order to cause you to make these pleas of guilty?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you regarding this case in order to induce you to plead guilty?

THE DEFENDANT: No.

THE COURT: Do you understand the elements of the crime of murder?

THE DEFENDANT: Uh-huh.

THE COURT: As it applies to this case, murder is the unlawful killing of a human being with malice aforethought, either express or implied.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or when all of the circumstances of the killing show an abandoned and malignant heart.

In this case, we're talking about first degree murder. Murder of the first degree is that which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing; or that which was committed in the perpetration or attempted perpetration of a sexual assault, kidnapping, arson, robbery, burglary or sexual

molestation of a child under the age of fourteen years.

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with malice aforethought is murder of the first degree.

"Deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of action.

The word "premeditated" means considered beforehand. The killing must be preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was a result of deliberation and premeditation, that it must have been formed upon a pre-existing reflection and not under a sudden heat of passion or other conditions precluding the idea of deliberation; or, as I stated to you earlier, could be committed in the perpetration of a robbery or an arson.

There are other lesser included offenses within the charge of murder which you could be convicted.

You could be found guilty of second degree murder. Second degree murder is the unlawful killing of a human being with malice aforethought when there is manifested intention unlawfully to kill a human being, but the evidence is insufficient to establish deliberation and premeditation.

Manslaughter is the killing of a human being without malice, express or implied, and is also a lesser included offense.

In this case you have been further charged with the use of a deadly weapon in committing murder.

You have been charged with robbery. Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury to the person and against his will.

In addition, you're charged with using a deadly weapon, a firearm in this case. You could be convicted of lesser included offense of larceny and larceny from the person in the robbery case.

First degree arson occurs when a person willfully, and maliciously sets fire to and causes to be burned a structure, whether the property of himself or another.

The State must prove all of these elements of the crimes which you have been charged beyond a reasonable doubt if you should go to trial. By entering a plea of guilty in these cases, you waive the right to go to a jury trial.

Under Nevada law, a person who is convicted of murder or who pleads guilty to murder is not entitled to have his sentence suspended and be placed on probation.

Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: A person who is convicted of or who pleads guilty to murder with a deadly weapon or robbery with a deadly weapon is not entitled to have his sentence suspended and be place on probation.

That any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime, and the sentence shall run consecutively with the sentence prescribed by the statute for such crime.

Every person convicted of murder in the first degree shall be punished by death, only if one or more aggravating circumstances are found, and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstances.

Otherwise, by imprisonment in the state prison for life, with or without the possibility of parole. If the penalty is fixed at life imprisonment with the possibility of parole, eligibility of parole begins when a minimum of ten years has been served.

In this case, since you are charged with the use of a deadly weapon, the penalty for each charge would be doubled and run consecutively. If the punishment were to be fixed at life imprisonment, for example, for the murder charges, you would be punished to two life imprisonments for each charge to run consecutively.

The punishment for robbery is not less than one year nor more than fifteen years. Since you are charged with using a deadly weapon in the commission of a robbery, any sentence of imprisonment would be enhanced by any additional like term which would run consecutively.

On the robbery charge you could be imprisoned for fifteen years and an additional consecutive fifteen years for the use of a deadly weapon in the commission of a robbery on each count.

The punishment for first degree arson is a maximum of fifteen years and you may be fined also in the sum of $15,000.

Do you understand those punishments as I have related to you?

THE DEFENDANT: Yes, sir.

THE COURT: The death penalty for first degree murder in the State of Nevada, as I have explained to you, is determined by the balancing of aggravating circumstances against mitigating circumstances.

Circumstances which first degree murder may be aggravated and thus invoke the death penalty as are follows:

The murder was committed by a person under sentence of imprisonment.

The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.

The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device, or course of action which would normally be hazardous to the lives of more than one person.

The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, sexual assault, arson in the first degree, burglary or kidnapping in the first degree, and the persons charged killed or attempted to kill the person murdered, or knew or had reason to know that life would be taken or lethal force used.

That the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

That the murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.

The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or a fireman.

For purpose of this subsection, "peace officer" means Sheriffs of counties and their deputies, marshalls and policeman of cities and towns, the chief and agents of the Investigation Division of the Department of Motor Vehicles, the personnel of the Nevada Highway Patrol, and the director, deputy director, correctional officers and

other employees of the Department of Prisons when carrying out the duties prescribed by the director of the department.

The murder involved torture, depravity of mind or the mutilation of the victim.

The murder was committed upon one or more persons at random and without apparent motive.

Do you understand that the State must show at least one of these aggravating circumstances before the death penalty can be invoked in this case?

THE DEFENDANT: Yes.

THE COURT: You're also entitled to present evidence in mitigation. Circumstances which first degree murder may be mitigated are as follows:

That the defendant has no significant history of prior criminal activity.

The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

The victim was a participant in the defendant's criminal conduct or consented to the act.

That the defendant was an accomplice in a murder committed by another person and his participation of the murder was relatively minor.

The defendant acted under duress or under the domination of another person.

The youth of the defendant at the time of the crime and any other mitigating circumstance.

If I accept your plea of guilty, a separate penalty hearing will be held to determine whether you should be sentenced to death or life imprisonment on the three murder with a deadly weapon charges; do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: The hearing will be before a three-judge panel made up of myself and two other district judges from other judi-

cial districts in Nevada which will be appointed by the Supreme Court.

After the hearing, the judges will determine if the aggravating circumstance or circumstances I previously read to you exist in this case, and whether or not mitigating circumstance or circumstances are found to exist.

Upon these findings you could be sentenced to life imprisonment with or without the possibility of parole or death. Any life sentence would be enhanced by an additional life sentence because of the use of a deadly weapon in the commission of the crime, as I've previously explained to you.

As I also previously explained to you, there is no probation for murder with a deadly weapon.

I will be the sole sentencing judge on the two robbery with the use of deadly weapon charges for which there is no probation, and the arson charge.

The three-judge panel may impose a death penalty only if it finds at least one of the aggravating circumstance and further finds there are no mitigating circumstance or circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: The death sentence can be impose only if all three judges agree. Any other sentence may be imposed by only a vote of the majority of the judges.

By entering your plea of guilty, you waive and give up the right to have a trial jury make the determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances and you leave it up to the three-judge panel.

Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: The judgment of the panel of judges is automatically appealed to the Nevada Supreme Court, unless you affirmatively waive the appeal, within 30 days after rendition of sentence.

The appeal will be taken to review the record to determine the following things:

If there were any errors enumerated by way of appeal; whether the evidence supports the finding of the aggravating circumstance or circumstances; whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and whether the sentence of death is excessive or disproportionate to the penalty impose in similar cases in this State, considering both the crime and the defendant.

The Supreme Court, when reviewing a death sentence, may either affirm the sentence of death, set the sentence aside and remand the case for a new penalty hearing if the

original penalty hearing was before a jury, before a newly impaneled jury; or if the original penalty hearing was before a panel of judges, before a panel of three district judges which shall consist, in so far as possible, of members of the original panel; or the Supreme Court could set aside the sentence of death and impose the sentence of imprisonment for life without the possibility of parole.

Do you understand all that, Mr. Moran?

THE DEFENDANT: Yes.

THE COURT: In Nevada, the death penalty is inflicted by an injection of a lethal drug.

Do you understand everything that I have explained to you at this point?

THE DEFENDANT: Yes, sir.

THE COURT: Do you still desire to enter a plea of guilty?

THE DEFENDANT: Yes.

THE COURT: By entering a plea of guilty, you're giving up certain valuable rights.

As I indicated to you, you have a right to a speedy and public trial by an impartial jury, free of any pretrial publicity, at which time it would be the burden of the prosecution to prove your guilt beyond a reasonable doubt.

Do you understand that right?

THE DEFENDANT: Uh-huh.

THE COURT: Do you wish to waive and give up that right?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that you have the right to be confronted by the witnesses and the accusers against you and cross-examine them?

THE DEFENDANT: Yes.

THE COURT: Do you wish to waive and give up that right?

THE DEFENDANT: Yes.

THE COURT: You have a right to compel witnesses to attend court and testify on your behalf. Do you understand that right?

THE DEFENDANT: Yes.

THE COURT: Do you wish to waive and give up that right?

THE DEFENDANT: Yes.

THE COURT: You have the right to testify on your own behalf and the right to refuse to testify; that is, to remain silent, in which event the prosecution cannot comment to the jury upon that fact.

Do you understand that right?

THE DEFENDANT: Yes.

THE COURT: Do you wish to waive and give up that right?

THE DEFENDANT: Yes.

THE COURT: By entering a plea of guilty, you're giving up all of these rights. Knowing that you have these right, do you still wish to enter a plea of guilty?

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty because in truth and in fact you are guilty?

THE DEFENDANT: Yes.

THE COURT: In Case No. C67482 -- you have the Information in front of you?

THE DEFENDANT: Yes, sir, uh-huh.

THE COURT: On the 11th day of August, 1984, you were charged that within the County of Clark in the State of Nevada that you did then and there, without authority of law and with malice aforethought willfully and feloniously kill Linda K. Vanderwoort [sic], a human being, by shooting at and into the body of said Linda K. Vandervoort with a deadly weapon: To wit, a firearm.

Do you understand all of the allegations in that information?

THE DEFENDANT: Yes.

THE COURT: Did you do those things?

THE DEFENDANT: Yes.

THE COURT: Did you do so deliberately, with premeditation and malice and aforethought --

THE DEFENDANT: Not really.

THE COURT: -- as I've explained to you?

THE DEFENDANT: No, I didn't do it -- I mean, I wasn't looking to kill her, but she ended up dead.

THE COURT: Well, you're charged that you did, with malice aforethought, shoot at and into the body of Linda K. Vandervoort with a deadly weapon, a firearm.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: And did you do so deliberately and with premeditation?

THE DEFENDANT: No.

THE COURT: Did you think about it before you did it?

THE DEFENDANT: Not really.

THE COURT: Did you do it deliberately?

THE DEFENDANT: I don't know. I mean, I don't know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn't plan on doing it; you know what I mean?

THE COURT: Well, I've previously explained to you what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration for and against the proposed action.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: And the word premeditated means considered beforehand. Did you do that?

THE DEFENDANT: Yes.

THE COURT: And you remember the definition I gave you regarding malice aforethought?

THE DEFENDANT: Uh-huh.

THE COURT: A malice can be either expressed or implied; that express malice is the deliberate intention to unlawfully take away the life of a fellow creature.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: And in Case No. C67483 -- you have the Information in front of you, Mr. Moran?

THE DEFENDANT: Yes.

THE COURT: In that case you're charged with five counts. On the second day of August, 1984, in the County of Clark in the State of Nevada you're charged in Count I with murder with the use of a deadly weapon in that you did then and there, without authority of law and with malice aforethought willfully and feloniously kill Russell J. Rhoads, a human being, by shooting at and into the body of said Russell J. Rhoads with a deadly weapon: To wit, a firearm.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: And did you do that at the time of the perpetration of a robbery?

THE DEFENDANT: Yes.

THE COURT: In Count II, murder with the use of a deadly weapon, you have been charged that you did then and there, without authority of law and with malice aforethought willfully and feloniously kill Sandra Devere, a human being, by shooting at and into the body of said Sandra Devere with a deadly weapon: To wit, a firearm.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: And did you do that during the perpetration of that robbery?

THE DEFENDANT: Yes.

THE COURT: In Count No. III, you're charged that you did then and there unlawfully, willfully and feloniously take personal property: To wit, lawful money of

the United States from the person of Russell J. Rhoads, or in his presence, by means of force or violence or fear of injury to and without the consent and against the will of said Russell J. Rhoads, said defendant -- being you, Mr. Moran, using a deadly weapon: To wit, a firearm, during the commission of said crime.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: In Count IV, you are charged with robbery with the use of a deadly weapon in that you did then and there willfully, unlawfully and feloniously take personal property: To wit, lawful money of the United States from the person of Sandra Devere, or in her presence, by means of force or violence or fear of injury to and without the consent and against the will of said Sandra Devere, said defendant using a deadly weapon: To wit, a firearm, during the commission of said crime.

Did you do that?

THE DEFENDANT: Yes.

THE COURT: In Count No [sic] V, you were charged that you did then and there willfully, unlawfully, maliciously and feloniously set fire to and thereby cause to be burned a certain structure located at 1875 South Decatur, Las Vegas, Clark County, Nevada known as the Red Pearl Saloon, said structure being then and there the property of Ralph Warren, by the use of open flame and combustible materials and/or by a manner and means unknown.

Did you do that?

THE DEFENDANT: Uh-huh, yes.

THE COURT: Did all of these events that I have read to you occur in the County of Clark, State of Nevada?

THE DEFENDANT: Yes.

THE COURT: Did you know at the time that you did these events that what you were

doing was against the laws of the State of Nevada?

THE DEFENDANT: Yes.

THE COURT: Did you also know that what you were doing was wrong?

THE DEFENDANT: Yes.

THE COURT: The Court finds that the defendant's plea of guilty to the charge in Case No. C67482, and the defendant's pleas of guilty to the charges in five counts in Case No. C67483 to be freely and voluntarily given; further finds that the defendant understands the nature of the offenses and the consequences of his pleas and therefore accepts the pleas of guilty.

By virtue of your plea of guilty in Case No. C67482, the Court at this time adjudges you guilty of first degree murder with the use of a deadly weapon.

And by virtue of your plea of guilty in Case No. C67483, the Court adjudges you guilty of first degree murder with the use

of a deadly weapon as to Count No. I; guilty of first degree murder with use of a deadly weapon as to Count No. II; guilty of robbery with the use of a deadly weapon as to Count No. III; guilty of robbery with use of a deadly weapon as to Count No. IV; and guilty of first degree arson as to Count No. V.

This matter will be referred to the Department of Parole and Probation for a presentence investigation report.

Do you wish to have any witnesses present on your behalf at the penalty hearing in this matter?

THE DEFENDANT: No.

THE COURT: The Court will issue subpoenas for any witnesses you would like to be present; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Should you change your mind, would you inform the Court?

THE DEFENDANT: Yes.

THE COURT: Case No. C67482 and Case No. C67483, Counts I and II will be set over for a penalty hearing with a panel of three district judges, pursuant to NRS 175.551 to be commenced at the earliest possible date.

I will inform the Chief Justice of the Supreme Court of what has transpired here today. I have a vacancy in my calendar during the week of January 21, 1985. I will attempt to have the penalty hearing heard at that time.

As to Case No. C67483, Counts No. III, IV and V will be set over for imposition of sentence and rendition of judgment on January 21, 1985 at 10:00 a.m.

The trial dates in these cases of January 14, 1985 and January 28, 1985 are hereby vacated.

Do you have anything you wish to tell the Court at this time, Mr. Moran?

THE DEFENDANT: No.

THE COURT: Do you understand that I am going to inform the Chief Justice of the Supreme Court and request that he appoint to other district judges from different districts to be present for a three-judge panel to determine the penalty in this case regarding the murder and the murder with deadly weapon charges, and that that hearing before that three-judge panel will probably commence sometime during the week of January 21, 1985; do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: And that I will request that it be heard at that time. The sentencing on the other charges will be imposed and the judgment rendered on January 21 at 10:00 a.m.

Do you have any questions?

THE DEFENDANT: No.

THE COURT: Defendant will be remanded to the custody of the sheriff.

Court will be in recess.

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS.

/s/ LAURIE H. WEBB, C.S.R. No. 50
Official Court Reporter

CASE NO. C67482 and C67483

DEPT. NO. XII

DISTRICT COURT

CLARK COUNTY, NEVADA

-oOo-

THE STATE OF NEVADA, Plaintiff, vs. RICHARD ALLEN MORAN, Defendant.	REPORTER'S TRANSCRIPT OF PETITION FOR POST-CONVICTION RELIEF

BEFORE THE HON. MYRON LEAVITT,
DISTRICT JUDGE

Wednesday, April 20, 1988

10:00 A.M.

APPEARANCES:

For the State: DANIEL M. SEATON, ESQ.
Deputy District Attorney

For the Defendant: CAL J. POTTER, III, ESQ.

Reported by: LAURIE H. WEBB
Official Court Reporter
C.S.R. No. 50

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. . . .

WILLIAM D. O'GORMAN,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POTTER:

Q. Would you state your name for the record please.

A. William D. O'Gorman.

Q. What is your profession?

A. I'm a psychiatrist.

Q. And you've qualified as an expert in this and other courts; is that correct?

A. Yes, I have.

MR. POTTER: Your Honor, for the purposes of this hearing, Mr. Seaton has stipulated that he is an expert.

MR. SEATON: That is correct, Judge.

THE COURT: The record will so show.

MR. POTTER:

Q. And pursuant to a court order, did you have occasion to interview Mr. Moran, the gentleman seated to my left?

A. Yes, I did, in the County Jail on the 12th of September of 1984.

Q. All right. And as a result, of that interview, you wrote a report and submitted that report to the Court; is that correct?

A. Yes, I did.

Q. And do you have a copy of that report with you today?

A. Yes, I do.

Q. And are you able to remember the conclusions that you reached in that report?

A. The conclusions that I reached in the report dealt with the fact that Mr. Moran was knowledgeable after the fact of crimes that had been committed, he could assist his attorney in his own defense if he so desired.

Q. Did you also reach any opinions about his ability to comprehend the crimes that

he had been charged with at the time that the crimes would have been committed?

A. He told me at that time that he did not remember the actual crimes, but was informed afterwards and this in turn precipitated a reaction on his part that he wanted to die, take his life, but also that he would want to have his ex-wife accompany him and did, in fact, but he does not recall the actual incidents at the time.

Q. And did he relate to you whether, in fact, he was under the influence of drugs at the time of these crimes?

A. Yes, he did. And his drug history goes back a long way to the age of 14 and subsequently thereafter with all of the street drugs, LSD a hundred times, on to speed, to marijuana and then a heavy use of cocaine that began about 1983, very heavy use prior to the incident of the Red Pearl incident and his subsequent reaction after-

wards that precipitated his desire to kill himself.

THE COURT: For the record, Mr. Potter, I think we ought to make it clear, it's pretty obvious you've called him as a witness, but the doctor/patient relationship privilege has been waived in this case?

MR. POTTER: That is correct, Your Honor.

THE COURT: For the record. All right. You may proceed.

MR. POTTER:

Q. Dr. O'Gorman, do you have an opinion about Mr. Moran's ability to comprehend what was occurring at the time of these crimes that you've alluded to concerning the cocaine addiction, what effect that would have on his perception?

A. Well, at the actual time, if he were under the influence of large amounts of cocaine, particularly free-base or crack, I don't think he could form intent at that moment.

My experience with cocaine is that it's very, very devastating, that those who are indulgent in this do not question motivation, their own motivation at all. They are consumed with the desire to get more, over and above any restrictions and restraints.

Q. And that opinion is based upon a reasonable degree of medical certainty; is that correct?

A. Yes.

Q. What experience have you had in dealing with individuals who are under the influence of free-base or crack?

A. Well, I can't give you the specific number, but there are quite a few. It's become more and more common, and my experience with those that I have seen, they are extremely quick, they are impulsive, they don't question their own behavior or actions at all. And right or wrong, they just blindly go ahead.

MR. POTTER: All right. I would pass the witness at this time.

THE COURT: Mr. Seaton, you may cross-examine.

MR. SEATON: Thank you, Judge.

CROSS-EXAMINATION

BY MR. SEATON:

Q. Your interview was on September 12, 1984, Doctor?

A. Yes, sir.

Q. For how long a period of time did it last?

A. I think I recorded the time of 51 minutes.

Q. Where were you located during that period of time?

A. The county jail. It was -- I believe -- it was the Clark County Detention Center, I'm not certain now.

Q. Was it a face-to-face interview?

A. Yes, it was.

Q. It wasn't through the window with the telephones?

A. No, it was not.

Q. Were the two of you alone in the room together?

A. Yes.

Q. For the entire 51 minutes?

A. Yes, sir.

Q. Was a guard nearby on the outside, do you know?

A. No, they usually lock the door and leave.

Q. Okay. So I would take it that there was no fear -- you didn't have any fear of Mr. Moran at that time?

A. No.

Q. Okay. How would you describe his demeanor during that interview?

A. I would say he was depressed.

Q. Did he readily exchange information with you?

A. Yes.

Q. No hesitancy or reluctance?

A. Not that I could discern.

Q. Was he intelligent in his answers to you?

A. Yes.

Q. You could understand everything he said?

A. Yes, I could.

Q. How about eye contact, do you remember if he kept eye contact or not?

A. Well, I don't recall. I believe he did. I'm not sure.

Q. There was nothing in that interview to make you concerned about how willing he was to exchange information with you?

A. No, I think he was very open.

Q. To try to phrase this a little bit in some of the words we use in our own legal parlance, was the information he gave to you at that time, then, knowingly and voluntarily given on his part?

A. I thought so.

Q. Okay. Now, you made a statement toward the end of your testimony with Mr. Potter that, and correct me if I misstate this, if a person is under the influence of cocaine, they can't form the intent to kill, is that your statement?

A. Well, that was my statement on the basis that they don't censor any of their impulses at all. They blindly go ahead, particularly is this true with free-base or crack.

Q. So the question, then, one would have to pose is was a person really on coke at a particular time, in other words, let's get it down in the context of Mr. Moran. He's probably going to get on the stand and say that "at the time of the killing, I was under the influence of coke."

So one would have to question and determine whether or not a person actually was on coke to know whether or not this

theory was operative at the time. Is that true?

A. I agree.

Q. And similarly, would you agree that you'd also have to determine whether or not the drug being used was, in fact, cocaine?

A. True.

Q. Wouldn't you also have to determine the quantity of cocaine taken at a given moment?

A. True.

Q. So you are not here telling us that Mr. Moran at the time he committed the killings wasn't able to formulate the intent?

A. I'm only reporting my opinion based on Mr. Moran's conversation with me at that time.

Q. Okay. So if at a later time he has told the Court that he was cognizant enough to form premeditation and intent, that would be a conflicting statement with the

information that you're basing your opinion on?

MR. POTTER: I'm going to object for purposes of the record that it assumes facts not in evidence.

MR. SEATON: Well, it's used it as a hypothetical then.

Q. Hypothetically speaking, if Mr. Moran had come into court later on and pled guilty and during the canvas during which he pled guilty he indicated to the Court's satisfaction that he was capable of forming intent and premeditation, that would be diametrically opposed to the cocaine filled information that he had given you earlier?

A. To answer your question, Mr. Moran, as far as I could see, was very depressed. He did form an intent to kill his wife before he killed himself on the basis of being very deeply, suicidally depressed.

Q. He wanted to take her with him?

A. In that respect he wanted to take her with him, in that respect he formed an intent to kill her and himself.

Q. Okay.

A. Which is a result of the depth of depression that he was in.

Q. Thank you. And lastly, with regard to hypothetically, or in general, let's say, people who are under the influence of coke, some of them, wouldn't you agree, would be able to formulate the necessary intent?

A. Again, I think it's a question of the amount and how long they had used it and their own personality.

MR. SEATON: Thank you. I have nothing further.

REDIRECT EXAMINATION

BY MR. POTTER:

Q. Dr. O'Gorman, the opinions that you've expressed on Mr. Moran are based upon your interview of Mr. Moran where you've testified that he was being candid, correct?

A. Yes.

Q. And during that interview, and you've testified to the Court today as to the timeframe involved with the Red Pearl as being a time in which he was under the influence of crack and large amounts or doses of cocaine; is that correct?

A. Yes.

Q. And that's your recollection today of Mr. Moran freely and voluntarily explaining to you what had gone on in his life at the time of these Red Pearl murders; is that correct?

A. Yes.

Q. So that when you state that your opinion is based upon a reasonable degree of medical certainty, we're not talking about a hypothetical situation, we're talking about the incident involving Mr. Moran and the facts which he told you to be true, correct?

A. I would accept his word as being truthful and honest with me as a physician.

Q. Do you have any recollection either from memory or from your notes about the quantities that were involved when you interviewed him in terms of the cocaine?

A. Only that he stated he could not get enough and he had to get more.

Q. And that he, in fact, had been under the influence for a long period of time, correct?

A. Over a period of months, but more particularly I think heavily using it ten days prior to the incident.

MR. POTTER: I don't have any other questions, your Honor.

MR. SEATON: If I might, Judge. That's a point that really interests me, Doctor.

RECROSS-EXAMINATION

BY MR. SEATON:

Q. Do you have your report with you?

A. Yes, I do.

Q. I'm looking at the first page, second from the last paragraph, in which you speak about his ten-day usage ten days prior to -- let me just read that long to you.

This particular reference to the use of cocaine which he has free-based -- oh, I'm sorry, next sentence.

He reported that approximately ten days prior to the incident in the Red Pearl bar he was a heavy user of cocaine and used as much as he could get his hands on. He stated that he used up all his money spending it on cocaine. He stated that he had a severe need to continue to use it.

If the last time he used cocaine prior to the Red Pearl killings was ten days prior, that wouldn't have any impact on his

intent, would it, at the time of the killings?

A. I can answer that in this sense: A cocaine user is compelled to keep on going. I can't honestly say what ten days would bring except that I would think that he'd be depressed after ten days.

Q. But being depressed is something entirely different from having an inactive intent due to the use of cocaine, is it not?

A. Depends on the depth of depression. If severe, it would lead to his suicide. That's why people who are depressed commit suicide.

Q. But just assuming that this language in the report is correct and that the last time he used cocaine was ten days prior to the Red Pearl bar, you can't testify here under oath as an expert, can you, that his being under the influence of cocaine had anything to do with his intent at the time of the Red Pearl killings?

MR. POTTER: For the record, I'm going to object. I don't believe that's what the facts show. I believe it shows that -- or his testimony was that he had started using the cocaine ten days prior, is what the testimony --

MR. SEATON: No, it says that ten days prior to the incident in the Red Pearl bar he was a heavy user of cocaine.

THE COURT: He's questioning regarding the facts in his report. So the objection is overruled.

MR. SEATON:

Q. And, Doctor, just for the record, I am assuming just from the way I read this, that this guy had used a lot of coke up until ten days before and he ran out of money.

Now, just to give you a fact that maybe you're not even aware of, money was taken from the Red Pearl bar which would suggest to me at least that that money was what he

needed, he went to the Red Pearl bar to get some money to go get coke.

Now, my question to you is, assuming, and that's all we're doing here, that that was a ten-day hiatus of use of cocaine prior to the Red Pearl bar killings, that would not have any impact on his capability of formulating an intent at the time of those killings?

A. Again, to answer that question, I think that if he were depressed, without the use of cocaine, which is a common thing, his motivation would be based on his depression. It was my assumption when Mr. Moran told me that he was using a great deal of cocaine up to and including the time that incident happened at Red Pearl.

Q. Even though that's not quite the way your report reads?

A. Well, that was my intent.

Q. Okay. And speaking of your intent, you've been doing this for many, many years?

A. Yes.

Q. Coming into court speaking on both sides of the sanity question. You are aware of the importance of a defendant's ability to formulate intent, are you not?

A. Yes, I am.

Q. Yet nowhere in your report did you indicate that he was not capable of formulating intent at the time of the Red Pearl killings.

A. No, I didn't approach that at all.

MR. SEATON: Thank you, Doctor. I have no further questions.

MR. POTTER: No questions.

THE COURT: You may step down, Doctor, thank you for testifying.

THE WITNESS: Thank you.

THE COURT: Call you next witness.

MR. POTTER: Call Mr. Moran.

RICHARD MORAN,

having been first duly sworn to testify to the truth, the whole truth and nothing but

the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POTTER:

Q. Would you please state your name for the record?

A. Richard Moran.

Q. All right. And you're the defendant in this action; is that correct?

A. Yes.

Q. Petitioner on post-conviction relief?

A. Correct.

Q. And you have caused a petition to be filed with this court?

A. Yes.

Q. You've sat through the hearing this morning and you've heard the areas that the petition alleged or what I've explained to the Court; is that correct?

A. Yes.

. . .

A. Right. That must -- you know, now that I know what happened, that must be why they said there was no defense. But I didn't know about the statement when they told me that.

Q. What's your recollection of when you first heard about the statement?

A. The first I heard about the statement was in court during my penalty phase.

Q. After you had decided that you did not want to have counsel, you had occasion, I believe, on November 28 to come before his Honor, Judge Leavitt, to make a change of plea. Do you recall that day?

A. Wasn't that the same day that --

Q. When you dismissed counsel?

A. Right. That was that day, right.

Q. And changed your plea?

A. Uh-huh.

Q. Do you recall during that timeframe in November whether, in fact, you were

taking any kind of medication in the Clark County Detention Center?

A. I was taking Indoral and Dilantin and phenobarbitol and Vistaril.

Q. And do you recall whether those drugs or medications had any affect upon your ability to know what was going on?

A. I didn't think they did at the time because I was on the drugs. But now when I wasn't on them anymore, I could see that they, you know, had an affect on me.

Q. And what affect did they have?

A. I wouldn't know how to describe it. I guess I really didn't care about anything, you know, it wasn't -- I wasn't very concerned about anything that was going on, you know, as far as the proceedings and everything were going.

Q. And when did you get off of that medication?

A. In the state prison.

Q. All right. And do you recall the reasons that you were taken off the medication?

A. The doctor -- well, not the doctor, the nurse when I went to get my medication, she told me that I wasn't on the medication any more because the doctor felt that my seizures were the result of cocaine use and because I hadn't used it in so long, I didn't need the medication.

Q. And what seizures are you talking about?

A. Well, I had a seizure in the County Jail. I had one prior to that, I don't know exactly how much, you know, maybe a month earlier.

Q. Were you treated by a physician for the first seizure that you talked about?

A. I went to see one.

Q. And who did you go see?

A. Dr. Fox, his name is.

Q. And what, if anything, did he treat you with?

A. He gave me Dilantin.

Q. And this is the same treatment that you had received in the Clark County Jail.

A. Right.

Q. Then you got into the prison system and that physician up there made a different diagnosis?

A. Right.

Q. All right. And that diagnosis was what?

A. He felt I didn't need them because my seizures were caused by cocaine.

Q. Since the time that you've been in the prison system for approximately three and a half, four years, are you on medication at this time?

A. No, I'm not.

Q. Have you had any seizures since that time?

A. No, I haven't.

Q. And you haven't been under any medication that was not prescribed, any contraband medication or anything of that nature?

A. You mean have I been taking drugs up there?

Q. Yes.

A. No, I haven't.

Q. When you informed Judge Leavitt November 28, 1984, that you were under the influence of lots of drugs at the time that these crimes were committed, do you recall stating that to him?

A. I don't recall stating it, but I recall reading it in the --

Q. The transcript?

A. The transcripts of your opening

. . .

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * * * * *

RICHARD ALLEN MORAN, Petitioner, vs. THE STATE OF NEVADA, Respondent.	)	Case No. C 67482 Case No. C 67843 Dept. No. XII Docket "R"

FILED: Sep. 23, 1987

SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

COMES NOW, the Petitioner, RICHARD ALLEN MORAN, by and through his attorney, CAL J. POTTER, III, ESQ. and submits the following Affidavit and supporting medical records in Opposition to the Respondent's Motion to Dismiss.

DATED this 23rd day of September, 1987.

LOVELL, BILBRAY & POTTER

By: /s/ Cal J. Potter
CAL J. POTTER, III, ESQ.
Attorneys for Petitioner
428 South Fourth Street
Las Vegas, Nevada 89101

AFFIDAVIT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

CAL J. POTTER, III, being first duly sworn, deposes and says:

That your Affiant has reviewed the medical records of the Petitioner, RICHARD ALLEN MORAN, from his August, 1984, hospitalization at Southern Nevada Memorial Hospital, as well as his medical records at the Clark County Detention Center on November 28, 1984, the date of the entry of plea;

That at the time this Court took the plea of RICHARD MORAN, the Petitioner was under the influence of drugs;

That the nursing notes from the detention center, attached hereto as Exhibit "A", reflect that on November 28, 1984, MORAN was under the influence of dilatin [sic]; 100 mg. x 3, an anti-epileptic medication that causes confusion; (See, PDR, attached hereto

as Exhibit "B", and incorporated herein by reference); inderal; beta-blocker anti-arrhythmic that causes light headedness, mental depression, hallucinations, disorientation, and short-term memory loss; (See, Exhibit "B", Id.); vistaril, a CNS depressant that causes drowsiness, tremors, and convulsions;

That at the time of the Petitioner's statements to the Metro Officer on August 13, 1984, and the time of his video-taped confession, MORAN was under the influence of narcotics;

That the medical records from the Petitioner's hospitalization on August 6, 1984, indicate that RICHARD MORAN was admitted from surgery to recovery at 2230 hours, August 11, 1984, awake and responsive, but still drowsy from anethesia [sic]. At 2400 hours, he opened his eyes to his name and commuicated [sic] by writing (noted by RN Martin);

That during surgery, Petitioner was given Pentothal and Fentanyl, during the time period of approximately 1830-2030 hours. In post-anethesia [sic] recovery period, he was medicated with demoral [sic]. That Petitioner post-operatively was medicated with morphine sulfate on August 11, 1984; August 12, 1984; August 13, 1984; and August 14, 1984. That the video-taped confession was taken on August 14, 1984.

Further Affiant sayeth naught.

/s/ Cal J. Potter
CAL J. POTTER, III

SUBSCRIBED and SWORN to before me this 23rd day of September, 1987.

/s/ Jewelene Farris
NOTARY PUBLIC

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,
Petitioner,

v.

RICHARD ALLAN MORAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1992
CERTIORARI GRANTED DECEMBER 14, 1992

QUESTIONS PRESENTED

I. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a trial court to apply a heightened "reasoned choice" standard to determine the competency of a defendant to enter a plea of guilty or waive counsel, or whether the standard of competency to plead guilty and waive counsel is the same as the standard of competency to stand trial announced in Dusky v. United States, 362 U.S. 402 (1960).

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No. 92-725

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison

Petitioner,

v.

RICHARD ALLAN MORAN

Respondent.

PETITIONER'S BRIEF ON THE MERITS

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit [Ninth Circuit or circuit court] was filed on July 30, 1992. Appendix A to Petition for Writ of Certiorari [Petition]. Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992). The federal

district court's unpublished decision which preceded the circuit court litigation as filed on March 11, 1991. Appendix B to Petition.

On direct appeal from the state court convictions, the Nevada Supreme Court entered its published Opinion on March 31, 1987. Appendix C to Petition. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987). The order of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark [trial court or Clark County District Court], denying post-conviction relief, was filed on May 10, 1988. Appendix D to Petition. The Nevada Supreme Court's unpublished Order Dismissing Appeal of the post-conviction relief action was filed on March 15, 1989. Appendix E to Petition. This Court denied certiorari on October 2, 1989. Appendix F to Petition. Moran v. Whitley, ___ U.S. ___, 110 S.Ct. 207 (1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. U.S. Const. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Nev.Rev.Stat. § 178.400.

> Incompetent person cannot be tried, sentenced or punished for public offense.
>
> 1. A person may not be tried, adjudged to punishment or punished

for a public offense while he is incompetent.

2. For the purposes of this section "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.

STATEMENT OF THE CASE

The Petitioner [State] has lawful custody of respondent Richard Allen Moran [MORAN] pursuant to two convictions for first degree murder and resultant sentences of death imposed in the Clark County District Court, along with two counts of robbery with the use of a deadly weapon and one count of first degree murder sustained in the same case, with resultant prison terms imposed thereon. MORAN is also in custody pursuant to a conviction for one count of first degree murder and the resultant term of life imprisonment without possibility of parole

imposed in another case in the Clark County District Court.

Initially, the first set of charges [the Red Pearl Saloon offenses] proceeded through the justice court system separately from the third murder offense [the Vandervoort murder]. MORAN rejected the advice of counsel and waived preliminary (probable cause) hearings in the justice court. District Court Clerk's Record [CR] 21, Exhibits 1 and 6. Separate criminal informations were filed and the cases were assigned to the same trial court. On September 19, 1984, and November 28, 1984, Jack Jurasky and William D. O'Gorman, both psychiatrists, filed their respective reports with the trial court stating that MORAN was competent to assist counsel and defend the charges against him. Joint Appendix [J.A.], pp.3-17. Nev. Rev. Stat. § 178.400.

On November 28, 1984, MORAN appeared before District Judge Myron Leavitt with a

different public defender assigned to each case. After a canvass, the court allowed MORAN to waive his right to the assistance of counsel. After a further canvass, the court (1) accepted MORAN's pleas of guilty to all charges in both cases; (2) scheduled imposition of court sentencing on the non-capital charges; (3) accepted MORAN's accession to a consolidated penalty hearing before a three judge panel on both capital counts; and (4) scheduled the penalty hearing on the capital charges. J.A., pp.18-68.

On December 17, 1984, MORAN appeared before Judge Leavitt in proper person. The judge told MORAN he was unwise not to have the assistance of counsel. Nevertheless, MORAN would not change his mind and the judge confirmed MORAN's previous statement he did not wish to have standby counsel to assist him. Judge Leavitt asked MORAN if he wanted to reconsider either of those

decisions and to have the assistance of an attorney. MORAN stated he did not. MORAN indicated he did not want to withdraw his plea in either case. MORAN also stated he chose not to have any witnesses present on his behalf at the penalty hearing. He did not want anyone to investigate for the existence of mitigating circumstances. CR 21, Exhibit 8.

On January 21, 1985, MORAN appeared without counsel for sentencing on the non-capital counts. The court ordered imposition of consecutive fifteen (15) year terms for the robbery counts and weapons' use enhancements, as well as the arson count. CR 21, Exhibit 5.

That same day, pursuant to Nev. Rev. Stat. § 175.552, a three judge panel convened to consider evidence pertaining to the penalty to be imposed on the three murder counts. CR 21, Exhibit 9. In the Red Pearl Saloon murders, the panel found the exis-

tence of two aggravating circumstances beyond a reasonable doubt. It also found the existence of two mitigating circumstances. The panel found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and set the penalty at death on both counts. Nev. Rev. Stat. §§ 200.030(4), 200.033 and 200.035. CR 21, Exhibit 5.

In the Vandervoort murder, the panel found the existence of two aggravating circumstances beyond a reasonable doubt. It also found the existence of one mitigating circumstance. The panel found that beyond a reasonable doubt, the mitigating circumstance was insufficient to outweigh the aggravating circumstances. It set the penalty at death. CR 21, Exhibit 8.

The cases proceeded on automatic direct appeal to the Nevada Supreme Court. On March 31, 1987, the court issued its Opinion

affirming all convictions and sentences in the Red Pearl Saloon case. It modified the sentence for the Vandervoort murder from death to life without the possibility of parole. Appendix C to Petition.

On July 30, 1987, pursuant to Nev. Rev. Stat. § 177.315, et seq., MORAN filed a petition for post-conviction relief in the trial court. After an evidentiary hearing, the court entered its Order Denying Post-Conviction Petition on May 10, 1988. Appendix D to Petition. MORAN appealed the denial of collateral relief to the Nevada Supreme Court. On March 15, 1989, the Nevada Supreme Court entered its Order Dismissing Appeal, affirming each of the convictions and sentences. Appendix E to Petition. MORAN sought certiorari from this Court. CR 21, Exhibit 29. This Court denied certiorari. Appendix F to Petition for Writ of Certiorari.

MORAN then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. CR 1, CR 24. That petition was denied by the United States District Court for the District of Nevada, in its Memorandum Decision and Order entered March 11, 1991. Appendix B to Petition. CR 48. MORAN appealed to the Ninth Circuit. On July 30, 1992, the Ninth Circuit entered its Opinion reversing the district court judgment denying habeas relief and remanding with instructions. In its Opinion, the court held that the correct legal standard to waive counsel and to enter a guilty plea requires a higher level of mental competency than that required to stand trial. Appendix A to Petition. The State then filed a petition for writ of certiorari with this Court. On December 14, 1992, this Court entered its order granting the petition for writ of certiorari. ___ U.S. ___, ___ S.Ct. ___, J.A., pp.1-2.

STATEMENT OF THE FACTS

1. Operative Facts of the Offenses

On September 4, 1984, when MORAN appeared in the Las Vegas Justice Court on the Vandervoort murder and voiced his intent to waive preliminary hearing despite his attorney's advice not to do so, Justice of the Peace Daniel Ahlstrom directed the prosecutor to review each count and to state what the prosecutor was prepared to prove regarding the murder of Linda Vandervoort. Las Vegas Metropolitan Police Department (LVMPD) Officer O'Such was prepared to testify that he and another police officer arrived at Vandervoort's apartment at approximately 4:45 p.m. and after observing what he believed to be a bullet hole in the adjoining apartment, they entered the apartment of Vandervoort to find her crumpled body full of bullet holes. Dr. Clark, a forensic pathologist, was prepared to testify that the victim died of numerous

gunshot wounds inflicted by a large caliber gun. Officer B.W. Jackson, a corrections officer with the LVMPD, was prepared to testify that when MORAN awakened after surgery for gunshot wounds sustained in a suicide attempt, MORAN asked Jackson if he was a policeman and if MORAN's wife was dead. Jackson was also prepared to testify that MORAN had volunteered information to the effect that he had killed three people within the last couple of weeks and later clarified that MORAN stated that the victims were his wife and two people in the Red Pearl bar.

MORAN stated to Judge Ahlstrom that he understood what the prosecutor had said and he admitted committing the offense. MORAN was advised the State was seeking the death penalty in the Red Pearl case as well as the case involving the killing of Vandervoort. The preliminary examination was waived and MORAN was held to answer the charges.

On September 5, 1984, MORAN again appeared before Judge Ahlstrom on the Red Pearl charges and waived his right to a preliminary hearing. This was against the advice of his attorney, a different public defender than in the Vandervoort case. CR 21, Exhibit 1. The court asked the prosecutor to review each count and state what the prosecutor was prepared to prove. Ralph Warne was prepared to testify that he owned the Red Pearl Saloon in Las Vegas, Nevada. He had left the lounge at 10:00 p.m., August 1, 1984. Sandra Devere was the bartender he left in charge. When Warne returned to the lounge at about 5:30 a.m., on August 2, 1984, he found the dead bodies of Devere and a customer, Russell Rhoads. Over $900 was missing, along with the cash register. CR 21, Exhibit 1, p. 3.

Captain Mike Patterson, of the Clark County Fire Department, investigated the fires that had been set at the Red Pearl the

morning of August 2, 1984. He was prepared to testify as an expert that the fires had been set in several different locations in the lounge. Id., p. 4. Dr. Sheldon Greene, a forensic pathologist, performed the autopsies on Rhoads and Devere. He was prepared to testify that each had died from multiple gunshot wounds inflicted by a large caliber weapon. Id., 4. LVMPD Officer B. W. Jackson was prepared to testify that MORAN admitted in a statement to police he had killed his ex-wife and two people at the Red Pearl. Id., p.4. Detective Joseph McGuckin later videotaped an interview after advising MORAN of his rights. MORAN admitted he had killed Rhoads and Devere with a .45 automatic pistol. Id., p. 5.

MORAN told Judge Ahlstrom that he understood what had been said. MORAN admitted he had committed all the offenses. MORAN was advised the state was seeking the death penalty in the Red Pearl case as well as the

Vandervoort case. MORAN admitted to the conduct contained in each of the counts. The preliminary examination was waived and MORAN was held to answer to the charges. Id., pp. 6-10.

On November 28, 1984, MORAN appeared before Judge Leavitt for arraignment. The judge performed an extensive canvass regarding MORAN's desire to waive counsel and to enter guilty pleas on all charges. He allowed MORAN to waive and plead guilty. J.A., pp.18-68.

On January 21, 1985, the penalty hearing was held. CR 21, Exhibit 9. Captain Patterson testified about the fires that had been set at the Red Pearl the morning of the killings. Photo exhibits were introduced showing the scene of the fires and killings. Id., pp. 6-16. Detective McGuckin, who investigated the killings at the Red Pearl described the scene as he saw it the early morning hours of August 2, 1984. Id., pp.

17-29. Numerous photos were entered into evidence. MORAN did not want to see them and did not object to their admission. Id., p. 30. Detective McGuckin interviewed a witness who saw a vehicle similar to MORAN's leave the scene of the crime. Detective McGuckin testified regarding details of his pre-interview interaction, including a Miranda canvass, with MORAN. Id., pp. 42-46, 51. Judge Leavitt found that the statement made by MORAN was voluntary. Id., p. 52. MORAN had admitted to the killings, the arson and the robberies. Id., p. 53. MORAN gave his consent to the police to search his residence and his vehicle. Id., pp. 56-57. MORAN had written confessions that were discovered at his apartment. Id., pp. 58-59; CR 21, Exhibit 2. MORAN wanted the death penalty. CR 21, Exhibit 9, pp. 60-61. MORAN was very cooperative. Id., p. 127. The videotape of the interview amply illustrated MORAN's awareness and understanding of the

proceedings. Penalty Hearing, CR 21, Exhibit 42.

Tammy Cortez, originally a co-defendant of MORAN's in the Red Pearl case, testified she was with MORAN when he went into the bar. Id., pp. 74-76. She described what happened inside the lounge. She saw MORAN shoot Devere and then reach behind Cortez, shooting Rhoads where he sat next to Cortez on a stool. Id., pp. 77-83. Later, Cortez saw him leave the bar, reenter it, and exit carrying a cash register. MORAN told her not to tell the police. Id., pp. 85-87.

Detective Dillard testified about his investigation nine days later of the killing of Linda Vandervoort. MORAN had initially told the police that intruders had shot him and Vandervoort. Dillard described photo exhibits showing the scene where Vandervoort was shot. MORAN shot his ex-wife with the gun that he had used to kill Rhoads and Devere. Id., pp. 168-207. Detective Dillard

was specifically asked about MORAN's condition at the hospital in light of MORAN's apparent pain and his being medicated. Dillard said MORAN was cooperative and not reluctant to talk. MORAN was cogent and spoke without being threatened, promised anything or induced to talk. MORAN was able to understand and was aware of the purpose of the videotaped interview. Id., pp. 121-128. Judge Leavitt found the taped interview to be knowingly, freely and voluntarily given. It was played for the sentencing panel. (The tape was provided to the Ninth Circuit for its review below).

After presentation of the state's evidence, the court advised MORAN of his right to present evidence of mitigating circumstances and to make an unsworn statement. MORAN declined to offer any evidence in mitigation. Id., pp.139-143. The only statement MORAN made was that he had been under the influence of a lot of drugs. Id,. p.141.

2. Facts Regarding the Post-Conviction Relief Hearing

Judge Leavitt conducted a post-conviction relief hearing (CR 9, Petition, Tab B), at which Dr. O'Gorman testified. J.A., pp.69-89. Judge Leavitt found MORAN did not meet his burden of proof in attempting to show his guilty pleas were involuntarily entered, because MORAN presented no evidence as to the effect on him of any drugs he may have ingested prior to the entry of his plea. Judge Leavitt concluded that the evidence presented by MORAN, to the effect that he was depressed and desired the death penalty, was insufficient to make his plea involuntary. Appendix D to Petition for Writ of Certiorari, at D-9.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals upon a petition for writ of certiorari arises under 28 U.S.C. § 1254(a).

SUMMARY OF THE ARGUMENT

In Dusky v. United States, 362 U.S. 402 (1960), this Court enunciated the standard of mental competence for a defendant to stand trial: [T]he "test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as a factual understanding of the proceedings against him." The State urges this Court to apply the Dusky "understand and assist" mental competency standard to those instances where a defendant chooses to waive his right to counsel or to enter a guilty plea.

Even though MORAN had been found competent under Nevada law to stand trial, the Ninth Circuit incorrectly concluded that the federal constitution requires a higher "reasoned choice" standard to assess a defendant's competency to waive his right

to counsel and to enter a plea of guilty. The reasons stated by the Ninth Circuit in applying a heightened standard of mental competency to plead guilty have been considered and rejected by nearly every other federal circuit. The Ninth Circuit's requirement that a heightened standard of mental competency be applied when an individual enters a plea of guilty or waives his right to counsel conflicts with better reasoned decisions of most other federal circuit courts of appeal and state appellate courts of last resort, which have relied on this Court's decision in Dusky. The Ninth Circuit's test unduly complicates the process that both state and federal trial judges must undertake when assessing the mental ability of a defendant. The Ninth Circuit's dual standard creates a dichotomy where defendants, although deemed competent to stand trial, could be denied the opportunity to engage in plea bargaining because

they do not have the requisite higher degree of competency to enter a plea.

Once the Ninth Circuit adopted a heightened standard in this case, a course never urged by MORAN[1], it improperly decided factual issues in a plenary fashion and concluded that MORAN was incompetent without remanding the case either to the district court or the state trial court for further evidentiary proceedings. The circuit court

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[1] It is the State's position that the holding below announced a new rule of federal constitutional law. In general, a case announces a "new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. Penry v. Lynaugh, 492 U.S. 302 (1989). New rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." Id. at 329. A decision announces a new rule "'if the result was not dictated by the precedent existing at the time the defendant's conviction became final.'" Id. at 314, quoting Teague v. Lane, 489 U.S. at 288, 301 (1989). Should this court disagree with the State and require application of the heightened standard adopted by the Ninth Circuit, this Court could and should nevertheless vacate the decision below on the basis of the nonapplicability of the new rule in this collateral proceeding.

impermissibly disregarded the state court findings regarding the factual issues surrounding waiver of counsel and pleas of guilty. Thus, the Ninth Circuit violated this Court's well established requirement of deference to state court findings regarding competency. Maggio v. Fulford, 462 U.S. 111, 113-121 (1983). The state trial court not only conducted an extensive canvass of MORAN, but also conducted a hearing on the issue of MORAN's mental competence to enter his plea of guilty and to waive counsel. The state trial court had an opportunity to observe the demeanor of MORAN and to weigh the evidence before it. There was no question in the judge's mind that MORAN was mentally competent to enter his pleas of guilty and to waive counsel.

Later, with the assistance of counsel, MORAN failed to convince the judge that certain prescription medications he was using at the time he waived counsel and

entered his pleas impacted his ability to participate in the process. The Ninth Circuit inexplicably has chosen to disregard those findings and instead has concluded that the state court did not apply the right legal standard, that is, a heightened "reasoned choice" standard. The Ninth Circuit has engaged in impermissible fact-finding and has substituted its judgment about the facts for that of the state trial court and the Nevada Supreme Court, respectively, based solely on its reading of the cold, naked transcript of the state court hearings. It has expanded its role beyond the bounds limiting federal courts of appeal. Amadeo v. Zant, 486 U.S. 214, 228 (1988). In so doing, it has breached the precedent of this Court, Wainwright v. Goode, 464 U.S. 78, 85 (1983); as well as its own. Neuschafer v. McKay, 807 F.2d 839 (9th Cir. 1987).

ARGUMENT

A. THE STANDARD FOR MENTAL COMPETENCY OF AN ACCUSED TO VOLUNTARILY PLEAD GUILTY OR TO WAIVE HIS RIGHT TO COUNSEL SHOULD BE THE SAME AS THAT TO STAND TRIAL.

The criminal conviction of an incompetent defendant is a denial of the due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Pate v. Robinson, 383 U.S. 375 (1966). A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Drope v. Missouri, 420 U.S. 162 (1975). However, none of the Court's precedents, including a critically ambiguous holding in Westbrook v. Arizona, 384 U.S. 150 (1966), which involved a waiver of counsel circumstance, have transmuted the federal common law or long established state and federal statutory codifications into a

due process mandate whereby the states must apply a heightened standard of competence in situations where a defendant desires to waive counsel or enter a guilty plea.

In Dusky, this Court was concerned only with the accused's competency to stand trial. This Court announced a general standard for mental competency without identifying it as a constitutionally compelled minimum.[2] Language extracted from Dusky has consistently been used by most circuit

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[2] There is no specific codified federal standard governing waiver of counsel or entry of guilty pleas. 18 U.S.C. § 4241 codifies the Dusky standard generally. It states in pertinent part that "at any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." (Emphasis added).

courts to evaluate mental competence to enter a guilty plea. Just last Term, in Medina v. California, ___ U.S. ___, ___, 112 S.Ct. 2572, 2579 (1992), this Court cited Dusky and Drope, for the proposition that

> If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him . . . The entry of a plea of not guilty by reason of insanity, by contrast, presupposes that the defendant is competent to stand trial and to enter a plea." (Emphasis added).

This Court has never precisely decided the issue of whether the standard for mental competency of an accused to plead guilty is the same as that to stand trial. Several circuits (First, Third, Fourth, Fifth, Sixth, Seventh and Eleventh) have expressly disavowed use of a heightened standard. With the exception of the Ninth Circuit[3] and the D.C. Circuit, virtually all of the

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[3] Seiling v. Eyman, 489 F.2d 211 (9th Cir. 1973).

remaining circuits (Second, Eighth, and Tenth) have interpreted the Dusky standard to apply to pleas of guilty without differentiating a high standard in the context of a waiver of counsel.

Likewise, the apparent consensus among state intermediate and appellate courts of last resort which have addressed the issue has been to apply Dusky to the context of a guilty plea situation. Several have expressly rejected a dual standard.[4]

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[4] See, e.g., People v. Heral, 323 N.E.2d 138, 140 (Ill.App.3d 1975) (expressly rejecting heightened standard for guilty pleas); Littlefield v. Commonwealth, 554 S.W.2d 872, 873 (Ky.App.), cert. denied, 434 U.S. 987 (1977) (expressly rejecting Seiling); Commonwealth v. Hubbard, 355 N.E.2d 469, 476 (Mass. 1976) (applying Dusky to trial and plea situations alike); People v. Belanger, 252 N.W.2d 472, 477 (Mich.App. 1977) (expressly rejecting Seiling and indicating Dusky standard as sufficient protection for any defendant either to stand trial or to submit a guilty plea); State v. Marteney, 313 N.W.2d 449, 453 (Neb. 1981) (essentially adopting a "understand and assist" test without reference to Dusky); State v. Lucas, 794 P.2d 1201, 1204 (N.M. Ct.App. 1990) (expressly rejecting Seiling); State v. Lambert, 225 S.E.2d 340 (S.C. 1976) (continued...)

While at least one commentator has urged the adoption of a heightened standard of competency in cases where defendants choose to proceed to trial as well as in cases of waiver of counsel and guilty plea situations, that approach apparently has garnered little support from the courts which face the practical problem of having to administer a system of criminal justice on a daily basis.[5]

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[4](...continued)
(noting that test for competency to plead is no more stringent than test for competency to stand trial). Contra, State v. Sims, 575 P.2d 1236, 1241 (Ariz. 1978) (expressly adopting Seiling and effectively overruling State v. Contreras, 542 P.2d 17, 18-19 (Ariz. 1975) (expressly noting disagreement with reasoning and interpretation of Dusky and Westbrook by Seiling court)); Starks v. State, 486 N.E.2d 491, 492 (Ind. 1985). See generally 38 A.L.R. Fed. 238 § 5.

[5] Note, Competence to Plead Guilty: A New Standard, 1974 Duke L.J. 149 (1974).

1. SIX CIRCUIT COURTS WHICH HAVE ADOPTED THE DUSKY STANDARD HAVE EXPRESSLY REJECTED THE USE OF A HEIGHTENED STANDARD IN A PLEA CONTEXT.

In Allard v. Helgemoe, 572 F.2d 1 (1st Cir.), cert. denied 439 U.S. 858 (1978), the court dealt with the precise issue before this Court. Without expressly rejecting Seiling, the circuit court held the standard of competence to plead is the same as the standard of competence to stand trial, Allard, at 4, citing Dusky, as the source of a unitary standard. In Allard, a New Hampshire prisoner argued there was a category of defendants who do not have the mental capacity to plead guilty but who may be competent to stand trial under Dusky, and he was in that category. The Allard court noted this view was generally unsupported in the case law. In addition, the court felt that Allard's assertion raised disturbing policy issues as well.

Allard contended his "middle" category of competence would not create administrative problems for the criminal justice system or unfairness for other defendants. He suggested that normal plea bargaining should take place, followed by a competency hearing to determine the defendant's ability to stand trial or to plead guilty. If the defendant were found competent to stand trial but not to plead guilty, he would have to be tried. If the defendant were then found guilty, the prosecutor would be bound to the terms of the original plea agreement.

The Allard court rejected these contentions as unworkable. The court opined that if the prosecutor must plea bargain in the dark without knowledge of defendant's possible incapacity to understand the charges against him, the plea bargaining system would become even more unwieldy than at present. Id. As astutely noted by the court, while there are currently psychologi-

cal experts who claim to be able to determine an individual's competency to stand trial under the general standard of Dusky, the court knew of no similar experts capable of determining whether or not a specific individual fully understands all of the elements of a particular offense. Under Allard's plan, most defendants would have every incentive to be found incompetent to plead. They would then have the best of all possible worlds -- a chance to convince the jury of their innocence, and a prosecutor bound to the lenient sentence offered in plea bargaining if they are found guilty. The court said it would be hard to imagine a defendant so incompetent that he would not want to at least try to take advantage of this possibility.

On the other hand, if the prosecutor has some knowledge of the defendant's infirm mental state or his intention to have his competency to plead determined at a hearing,

there is no reason for him to plea bargain until the hearing is completed. A defendant found incompetent to plead would then be tried without the benefit of plea bargaining. If found guilty, a defendant would simply have his sentence determined in the discretion of the trial judge within the law, a less reliable guarantee of leniency than a plea bargain could provide.

Allard also argued that an understanding of the elements of the offense with which one is charged is essential in practical terms to make any kind of informed evaluation as to the probability of success at trial. He argued that such an understanding is a prerequisite for a constitutional guilty plea, unless there is factual evidence on the record that can serve as a substitute. The Allard court rejected the assertion, holding the Dusky standard governs mental competence to stand trial and to plead guilty. The court stated:

> [T]he competency cases deal with the subjective ability of the defendant to participate in the process. . . The voluntary waiver analysis of Henderson [v. Morgan, 426 U.S. 639 (1976)] does not contradict the case law and policy arguments which maintain that the Dusky standard should apply to questions of a defendant's mental competence to stand trial and his competence to plead guilty.
>
> . . .
>
> [T]here must always be some compromise between a system's fairness and its ability to function; the courts must attempt to maximize the fairness in the system as a whole, although in a particular case that may result in less than maximum fairness for a particular individual. Because in many cases it could create a hardship to deprive a defendant of the opportunity to accept his counsel's recommendation and plead guilty, and because a standard of incapacity to plead guilty different from the standard of incompetence to stand trial could not be created without incurring that result, we hold that the incapacity to understand part of the elements of the offense with which one is charged does not, without more, make a guilty plea involuntary in constitutional terms.

Id. Accord, Figueroa-Vasquez v. United States, 718 F.2d 511, 513 (1st Cir. 1983).

In the earliest case rejecting a heightened standard, United States v. Harlan, 480

F.2d 515, 517 (6th Cir.) cert. denied, 414 U.S. 1006 (1973), the court denied a federal prisoner's claim that the test for competency to plead guilty should be more stringent than the test for competency to stand trial.

In Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974), Malinauskas argued that a different medical-legal standard should apply to the voluntariness of a guilty plea, and a defendant's competence to stand trial is not determinative of the issue. Id. at p.652. The Fifth Circuit rejected the argument, finding that decisions in prior cases could serve as predicates for this contention. The court concluded the test of mental competency at the time of trial or the entry of a plea in a criminal case is the same. Id. at 654. Accord, Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) (test of incompetency, whether it be to enter a guilty plea or to go to trial, is whether

a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 592, citing Dusky).

In United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975), the court rejected a Pennsylvania state prisoner's claim of incompetence to enter a guilty plea and expressly rejected the Ninth Circuit's heightened standard analysis in Seiling. The court's reasoning follows:

> The [Seiling] court interpreted [Westbrook] as implying that a higher standard of capacity was required to enter a plea of guilty than to stand trial. We have difficulty with that premise.
>
> The Dusky standard for competence to stand trial requires that the accused have a rational and factual understanding of the proceeding. That level of competence would seem to apply to entering a plea as well as to standing trial. The trial court has the duty of determining the voluntariness of the plea and the defendant's understanding of its consequences. Interrogation by the

> judge is designed to provide an on-the-record demonstration that the obligation has been met. We do not think that a mental standard, different than that for trial competence is required for a guilty plea.

McGough, n.2 at 342.

In United States ex rel. Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981), the Seventh Circuit agreed with the other circuits expressly rejecting the Seiling standard for the same practical and equity reasons that the Allard court rejected a dual standard.

In Shaw v. Martin, 733 F.2d 304 (4th Cir.), cert. denied 469 U.S. 873, reh'g denied, 469 U.S. 1073 (1984) and again in Roach v. Martin, 757 F.2d 1463 (4th Cir.), cert. denied, 474 U.S. 1039, reh'g denied, 474 U.S. 1014 (1985), the Fourth Circuit held that to show incompetence to plead guilty, a defendant must demonstrate that "his mental faculties were so impaired . . . when he pleaded that he was incapable of full understanding and appreciation of the

charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea." Roach at p.1480. The court stated that this standard of competence to plead guilty "paralleled" the standard established in Dusky, Id.

2. FOUR CIRCUIT COURTS WHICH HAVE ADOPTED THE DUSKY STANDARD IN A PLEA CONTEXT DID NOT ADDRESS THE HEIGHTENED STANDARD ISSUE.

In United States v. Valentino, 283 F.2d 634, 635 (2nd Cir. 1960), even though the court did not cite the recently announced Dusky standard, the court relied on the pre-Dusky statutory formulation for competency found at 18 U.S.C. § 4244 and held that a prisoner who had pled guilty but who was later found to be "insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense" could seek relief.

The Eighth Circuit first applied the Dusky standard in Butler v. United States,

384 F.2d 522 (8th Cir.), cert. denied, 391 U.S. 952 (1968) and more recently in Stanley v. Lockhart, 941 F.2d 707 (8th Cir. 1991). Although neither case dealt with the precise issue of the appropriate standard of mental competency to be applied when a defendant enters a plea of guilty, the defendants in both cases entered guilty pleas and the circuit court unhesitatingly applied the Dusky standard.

The Tenth Circuit expressly has adopted the Dusky standard for mental competency at the time of trial or the entering of plea in a criminal case. Wolf v. United States, 430 F.2d 443 (10th Cir. 1970). The court stated:

> the test of mental competency at the time of trial or the entering of a plea in a criminal case is that the accused have sufficient 'present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'"

Although the standard to be applied did not appear to be at issue, nevertheless the Tenth Circuit affirmed the Dusky standard of mental competency in a plea context.

Most recently, in U.S. v. Simmons, 961 F.2d 183, 187 (11th Cir. 1992), the Eleventh Circuit announced the governing standard of mental competency in a plea context:

> A defendant competent to stand trial is one who has 'sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding -- and [one who] has a rational as well as factual understanding of the proceedings against him [or her].' (Citations omitted). This standard of mental competency is the same as that required for entering a guilty plea. (Citations omitted).

3. ONLY TWO CIRCUITS HAVE ADOPTED A HEIGHTENED STANDARD IN A PLEA CONTEXT.

The only circuits that have applied a contrary and higher standard in a plea context are the United States Court of Appeals for the District of Columbia and the Ninth Circuit. See United States v.

Masthers, 539 F.2d 721 (D.C. Cir. 1976); Moran at 267-268; and Seiling at 214-215. The Ninth Circuit concluded in Moran that the correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning -- the capacity for a "reasoned choice" -- than that required to stand trial. However, as noted above, the majority of circuits and many state courts which have considered the issue have rejected this reasoning and concluded the test should be the same. For the reasons stated in Allard, Franzen and other cases discussed earlier, this Court should do likewise. As long as a trial court determines that a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and has a rational as well as factual understanding of the proceedings

against him, the right to due process has been protected.

4. THE HOLDING OF THIS COURT IN WESTBROOK V. ARIZONA DID NOT ESTABLISH A HIGHER STANDARD OF COMPETENCY IN ORDER FOR A DEFENDANT TO WAIVE COUNSEL.

In Westbrook, the Arizona courts conducted a hearing on the defendant's competence to stand trial, but there had been no hearing or inquiry as to his competence to waive his constitutional right to the assistance of counsel and to conduct his own defense. This Court held:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. Johnson v. Zerbst, 304 U.S. 458 (citation omitted).

Westbrook, at 150.

In order to represent himself, an accused must knowingly and intelligently forego the traditional benefits associated with right

to counsel. He should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Faretta v. California, 422 U.S. 806, 835 (1975). If the record clearly shows that the petitioner has expressly declined an offer of counsel by the trial judge, a state prisoner in federal collateral proceedings must show by a preponderance of the evidence that his acquiescence was not sufficiently understanding and intelligent to amount to an effective waiver. Moore v. Michigan, 355 U.S. 155, 160-161 (1957); Carnley v. Cochran, 369 U.S. 506, 516 (1962).

This Court's decision in Westbrook has been problematic for both state and federal courts. The Westbrook holding has been described as "cryptic," People v. Matheson, 245 N.W.2d 551, 554 (Mich.App. 1976). The degree of uncertainty the Westbrook holding

has engendered is aptly demonstrated by the Sixth Circuit's characterization of the standard as being "vaguely higher than the competency [standard] to stand trial." United States v. McDowell, 814 F.2d 245 (6th Cir.), cert. denied, 484 U.S. 478, reh'g denied, 484 U.S. 764 (1988). See also, United States v. Clark, 943 F.2d 775, 786 (7th Cir. 1991); Blackmon v. Armontrout, 875 F.2d 164, 166 (8th Cir.), cert. denied 493 U.S. 939 (1989).

Given its lack of definition, Westbrook has been read narrowly, that is, not to require a separate hearing or application of a higher standard, but merely an "additional effort" when dealing with defendants who are of subnormal intelligence. Carvalho v. Olim, 519 P.2d 892, 897, n.2 (Haw. 1974). Given the specific holding in Dusky, at most Westbrook reasonably can be read to say only that a finding on competence does not necessarily foreclose the issue of competence to

waive counsel. United States ex rel. Koningsberg v. Vincent, 388 F.Supp. 221, 225 (S.D.N.Y.), aff'd 526 F.2d 131 (2d. Cir.), cert. denied, 426 U.S. 937 (1976); State v. Drobel, 815 P.2d 724 (Utah.App. 1991).

Westbrook did not define expressly or inferentially a higher standard of competency in a constitutional, due process sense. Coronado v. Lefevre, 748 F.Supp. 131 (S.D.N.Y. 1990). Indeed, on facts similar to those in this case, where a defendant waived representation by counsel and then pleaded guilty, one court has gone so far as to hold that Westbrook was inapposite. Splitt v. United States, 364 F.2d 594, 598 (6th Cir.), cert. denied 385 U.S. 1019 (1967). Westbrook requires no more than a finding of competence to stand trial under the "understand and assist" standard, coupled with a court's inquiry that a defendant's decision to waive counsel and proceed on his own was made knowingly and intelli-

gently with full awareness of the risks and consequences. People v. Reason, 334 N.E.2d 572, 575 (N.Y. 1975).

B. THE NINTH CIRCUIT COMMITTED REVERSIBLE ERROR BY TOTALLY DISREGARDING THE STATE COURT FINDINGS, FAILING TO ACCORD THE STATE COURT FINDINGS THE PRESUMPTION OF CORRECTNESS, AND MISALLOCATING THE BURDEN OF PROOF TO THE STATE

Not satisfied at having applied a heightened standard which had not been urged upon it by MORAN, the Ninth Circuit panel then proceeded to give total factual credence and apparently conclusive weight to MORAN's mere assertions he had been under the influence of certain prescribed medications at the time of the plea. Moran at 265, 268. Regardless of the standard to be applied, the circuit court should not have ignored the respective findings of the state trial court and Nevada Supreme Court regarding MORAN's failure to provide evidentiary support for his claim that the medications impacted on

his competence to waive counsel and to enter a plea.

Regardless of which standard is to govern, nothing was presented to the Ninth Circuit which allowed it to ignore MORAN's failure to prove his case in the state collateral proceedings. Surely, the circuit court was cognizant of this Court's requirement and its own to defer to state court findings, even in competency cases. Maggio, at 2266; Evans v. Raines, 800 F.2d 884 (9th Cir. 1986), citing Miller v. Fenton, 474 U.S. 104 (1985). Clearly, the Due Process Clause does not prohibit allocating to the accused the burden of proof as to his competence. Medina, ___ U.S. at ___, 112 S.Ct. at 2577. It is hardly impermissible for the federal courts to allocate a similar or even heavier burden on a state petitioner seeking federal

habeas relief on the grounds of incompetency.[6]

Yet, the court excused MORAN from failing to meet his burden of proof in both the federal habeas corpus and state post-conviction proceedings to show by even a preponderance of the evidence that he was not competent to waive counsel or to plead guilty. Bouchillon at 592; Price v. Wainwright, 759 F.2d 1549, 1554 (11th Cir. 1985); Miller v. State, 517 P.2d 182, 184 (Nev. 1973). The mere fact that a defendant is being treated with anti-psychotic drugs does not per se render him incompetent to stand trial. The use of drugs is merely a relevant factor in the trial judge's determination of competency. In order to be entitled to a hearing, a defendant must present evidence demonstrating the dosages

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[6] One court has recently held that the standard of proof is high, so high that the facts must "positively unequivocably and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner." Sheley v. Singletary, 955 F.2d 1434 (11th Cir. 1992); Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987).

given to him has affected him so adversely as to raise doubt concerning his ability to consult with his lawyer and have a rational understanding of the proceedings against him. Sheley, at 1439; Fallada, at 1569.

CONCLUSION

The Court should conclude that the Due Process Clause does not mandate courts to assess an accused's competency to plead guilty or waive counsel under a heightened standard qualitatively different from the standard of competency to stand trial. A unitary standard of competency modeled on the "understand and assist" formulation announced in Dusky has been applied for more than three decades and is consistent with due process requirements. The unitary standard eliminates the impractical evaluation of differing levels of competency at differing stages of a criminal justice proceeding. More importantly, a unitary standard strikes a balance between the interests of those defendants who choose to proceed to trial and those who prefer to resolve their cases in the plea negotiation process.

Finally, the application of one standard provides a modicum of fairness to the government, which routinely bears the economic burden of financing competency evaluations.

This Court should reverse the decision below and remand for further consideration, directing the circuit court to (1) apply a unitary standard of competency while deferring to state court findings of historical fact, and (2) decide the issues that the court did not address in its first opinion.

DATED: January 28, 1993.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1992

SALVADOR GODINEZ, Warden,

Petitioner,

v.

RICHARD ALLAN MORAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether inquiry into a defendant's competence to stand trial as enunciated in *Dusky v. United States*, 362 U.S. 402 (1960) is constitutionally adequate to determine a capital defendant's mental competence to plead guilty, waive the assistance of counsel and forego the presentation of mitigating evidence at the penalty phase of a capital sentencing proceeding.

2. Whether the federal courts are bound by the presumption of correctness applicable to state court factual findings (28 U.S.C. §2254(d)) in the determination of the competence and voluntariness of a capital defendant's guilty plea and waiver of counsel where the state courts applied an incorrect legal standard, where material facts were not adequately developed in the state proceeding and where the record as a whole does not support the state court's determination.

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Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978) 25

Blackmon v. Armontrout, 875 F.2d 164 (8th Cir. 1989) 29

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Boykin v. Alabama, 395 U.S. 238 (1969) ..... *passim*

Brookhart v. Janis, 384 U.S. 1 (1966) 19

Carnley v. Cochran, 369 U.S. 506 (1962) 24

Chapman v. United States, 553 F.2d 886 (5th Cir. 1977) 29

Chavez v. United States, 656 F.2d 512 (9th Cir. 1981) 34

Clemons v. Mississippi, 494 U.S. 738 (1990) 33

Coleman v. Thompson, 111 S.Ct. 2546 (1991) 20

Collins v. Youngblood, 497 U.S. 37 (1990) 33

de Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976) 34

Demosthenes v. Baal, 495 U.S. 731 (1990) 27

Drope v. Missouri, 420 U.S. 162 (1975) ..... *passim*

Dusky v. United States, 362 U.S. 402 (1960) ..... *passim*

Estelle v. Williams, 425 U.S. 501 (1976) 20

Evans v. Raines, 800 F.2d 884 (9th Cir. 1986) 29

Faretta v. California, 422 U.S. 806 (1975) ..... *passim*

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Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) 22

Francis v. Henderson, 425 U.S. 536 (1976) 20

Frendak v. United States, 408 A.2d 364 (D.C. 1979) 30

Gilmore v. Utah, 429 U.S. 1012 (1976) 27

Government of Virgin Islands v. Niles, 295 F.Supp. 266 (D.V.I. 1969) 29

Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991) 44

Harrison v. United States, 392 U.S. 219 (1968) 40

Haynes v. Washington, 373 U.S. 503 (1963) 46

Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981) 46

Henry v. Mississippi, 379 U.S. 443 (1965) 20

Johnson v. Zerbst, 304 U.S. 458 (1938) ..... *passim*

Jones v. Barnes, 463 U.S. 745 (1983) 20, 31

Lenhard v. Wolff, 443 U.S. 1306 (1979) 27

Maggio v. Fulford, 462 U.S. 111 (1983) 18, 44

Marshall v. Lonberger, 459 U.S. 422 (1983) 43, 44

Massey v. Moore, 348 U.S. 105 (1954) 24, 32

Matusiak v. Kelly, 786 F.2d 536 (2d Cir. 1986) . 29, 44, 46

Maynard v. Cartwright, 486 U.S. 356 (1988) 33

McCarlo v. State, 677 P.2d 1268 (Alaska Ct. App. 1984) 30

McCarthy v. United States, 394 U.S. 459 (1969) 20, 22

Medina v. California, 112 S.Ct. 2572 (1992) 22

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Miller v. Fenton, 474 U.S. 104 (1985) 43, 44

North Carolina v. Alford, 400 U.S. 25 (1970) 20, 31

Parke v. Raley, 113 S.Ct. 517 (1992) 33

Pate v. Robinson, 383 U.S. 375 (1966) ..... *passim*

Patterson v. Illinois, 487 U.S. 285 (1988) 21, 27, 28

Penson v. Ohio, 488 U.S. 75 (1988) 20

People v. Chadd, 621 P.2d 837 (Cal. 1981) 30, 40

Riggins v. Nevada, 112 S.Ct. 1810 (1992) 23, 35

Rock v. Arkansas, 483 U.S. 44 (1987) 19

Rogers v. Richmond, 365 U.S. 534 (1961) 46

Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985) 38

Saddler v. United States, 531 F.2d 83 (2d Cir. 1976) 34

Schoeller v. Dunbar, 423 F.2d 1183 (9th Cir. 1970) 25

Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973) .... *passim*

State v. Bauer, 245 N.W.2d 848 (Minn. 1976) 30

State v. Chavis, 644 P.2d 1202 (Wash. Ct. App. 1982) 41

State v. Doss, 568 P.2d 1054 (Ariz. 1977) 30

State v. Shank, 410 So.2d 232 (La. 1982) 29

Stringer v. Black, 112 S.Ct. 1130 (1992) 33

Suggs v. LaVallee, 570 F.2d 1092 (2d Cir. 1978) 46

Taylor v. Illinois, 484 U.S. 400 (1988) 31

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Teague v. Lane, 489 U.S. 288 (1989) 33

Treece v. State, 547 A.2d 1054 (Md. 1988) 30

United States ex rel. Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970) 40

United States ex rel. Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981) 25

United States ex rel. Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975) 29

United States ex rel. Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975) 29

United States v. Clark, 943 F.2d 775 (7th Cir. 1991) 29

United States v. Cole, 813 F.2d 43 (3d Cir. 1987) 35

United States v. David, 511 F.2d 355 (D.C. Cir. 1975) 25

United States v. Johns, 728 F.2d 953 (7th Cir. 1984) 40

United States v. Kincaid, 362 F.2d 939 (4th Cir. 1966) 40

United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976) 25, 27

United States v. McDowell, 814 F.2d 245 (6th Cir. 1987) 29

United States v. Parra-Ibanez, 936 F.2d 588 (1st Cir. 1991) 35

United States v. Rossillo, 853 F.2d 1062 (2d Cir. 1988) 35

United States v. Wright, 627 F.2d 1300 (D.C. Cir. 1980) 30

Von Moltke v. Gillies, 332 U.S. 708 (1948) 19, 21, 27

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Wainwright v. Sykes, 433 U.S. 72 (1977) 20, 28

Westbrook v. Arizona, 384 U.S. 150 (1966) ..... *passim*

Wright v. West, 112 S.Ct. 2482 (1992) 33, 43

Yee v. City of Escondido, 112 S.Ct. 1522 (1992) 33

MISCELLANEOUS

American Psychiatric Press Textbook of Psychiatry (John A. Talbott, Robert E. Hales, Stuart C. Yudofsky, eds. 1988) 36

Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – A Dead End?*, 86 Colum. L. Rev. 9 (1986) 20

Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behav. Sci. & L. 291 (1992) 26, 27, 28, 32

Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. Miami L. Rev. (forthcoming 1993) 26, 27, 30, 39

Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 Tenn. L. Rev. 95 (1987) 9

Center for Studies of Crime and Delinquency, National Institute of Mental Health, *Competency to Stand Trial and Mental Illness* 99 (1973) 38

Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 Calif. L. Rev. 636 (1977) 31

TABLE OF AUTHORITIES – Continued

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George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193 (1977) 20

Frederick K. Goodwin and Kay R. Jamison, *Manic-Depressive Illness* (1990) 36, 37

Kay Redfield Jamison, *Touched With Fire: Manic-Depressive Illness and the Artistic Temperament* (1993) 37

Note, *Competence To Plead Guilty And To Stand Trial: A New Standard When A Criminal Defendant Waives Counsel*, 68 Va. L. Rev. 1139 (1982) 25

Note, *Competence to Plead Guilty: A New Standard*, 1974 Duke L.J. 149 40

Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237 (1974) 28

Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L.J. 1053 (1977) 25, 26

Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 Colum. L. Rev. 130 (1985) ..9, 40

Edward L. Rubin, *Toward A General Theory of Waiver*, 28 UCLA L. Rev. 478 (1981) 20

Robert Stern, Eugene Gressman, Steven Shapiro, *Supreme Court Practice* (6th ed. 1986) 42

G. Richard Strafer, *Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983) 28

TABLE OF AUTHORITIES – Continued

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G. Ulett, *A Synopsis of Contemporary Psychiatry* (5th ed. 1972) 28

Welsh S. White, *The Death Penalty in the Nineties* (1991) 8

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 972 F.2d 263. The memorandum decision and order of the district court (Pet. App. B1-B22) is unreported. The opinion of the Supreme Court of Nevada affirming the conviction (Pet. App. C1-C16) is reported at 103 Nev. 138, 734 P.2d 712. The order of the state district court denying postconviction relief (Pet. App. D1-D12) is unreported. The order of the Supreme Court of Nevada dismissing the appeal (Pet. App. E1-E7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992 (Pet. App. A1). The petition for a writ of certiorari was filed on October 16, 1992 and was granted on December 14, 1992 (J.A. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * * .

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

by an impartial jury * * * , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> * * * No State shall * * * deprive any person of life, liberty, or property without due process of law; * * * .

STATEMENT

Respondent Richard Allan Moran is presently under sentence of death after having been permitted by the State of Nevada to (a) plead guilty, (b) waive his right to trial counsel or standby counsel, and (c) adamantly refuse to allow the presentation of evidence in mitigation of the three death sentences imposed on him by the Eighth Judicial District Court, Clark County, Nevada, on January 21, 1985. (Pet. App. C1).[1]

At the time he appeared for initial arraignment before the Nevada courts on September 4 and 5, 1984, respondent was still recovering from a suicide attempt in

[1] On appeal, the Supreme Court of Nevada reduced one of the death sentences to a term of life imprisonment without parole due to the improper inclusion of two aggravating circumstances in the three-judge sentencing court's penalty determination (Pet. App. C9-C12). The death sentences imposed on the other two murders were affirmed (Pet. App. C12-C14).

which he had slashed his wrists and shot himself in the abdomen in the aftermath of having shot and killed his former wife Linda Vandervoort without apparent provocation on August 11, 1984. (Pet. App. B3-B4). The murder of his wife was preceded nine days earlier by the shooting – also without apparent provocation – of a bartender and customer at the Red Pearl Saloon in Carson City, Nevada on August 2, 1984. (*Id.*). At the time of these crimes, respondent, an individual with no significant prior criminal history, was abusing cocaine, methaqualone (Quaaludes) and alcohol, and had been consuming approximately two to three grams per day of cocaine. (J.A. 4-6; 11-12; 16).

Arraigned on three counts of first-degree murder and other crimes, respondent acted against the advice of his attorneys and waived his right to preliminary hearings on all three homicides. (Pet. App. B4). The trial court ordered him to be examined by two psychiatrists for the purpose of determining his competency to stand trial.

A. The Psychiatric Evaluations

Dr. Jack A. Jurasky interviewed respondent on September 17, 1984. (J.A. 3-9). He recounted respondent's long history of alcohol abuse and his heavy cocaine use in the period immediately preceding the three homicides (*id.* at 4-5). His alcohol abuse contributed to the break up of his marriage in October 1983 and had led to episodes of amnesia as well as an alcohol-induced seizure in February 1984. It was at that time that he switched to cocaine (*id.* at 5-6). Noting that respondent manifested no hostility nor in any way attempted to excuse himself or justify

his behavior (*id.* at 6-7), Dr. Jurasky characterized respondent's affect as "depressed but appropriate. Mood was sad and moderately depressed. He wept on two occasions when talking about the victims" (*id.* at 7).

Significantly, while concluding that respondent was "in full control of his faculties" insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so (*id.* at 8), Dr. Jurasky nonetheless concluded (*id.* at 8-9):

> *Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense* but I do not feel that it is necessarily a major consideration. It is the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy. (emphasis added).

Dr. William D. O'Gorman interviewed respondent on September 12, 1984. (J.A. 10-17). Dr. O'Gorman similarly recounted respondent's long history of drug and alcohol abuse, which led to the loss of his job at the Bingo Palace in February 1984 after five and one-half years of steady employment (*id.* at 11) as well as to a subsequent cocaine-induced seizure on August 28, 1984 while awaiting arraignment (*id.* at 12). He also reported respondent's heavy use of cocaine in the ten day period preceding the Red Pearl homicides (*id.* at 11-12) and noted respondent's

suicide attempt, reporting respondent's desire to kill his ex-wife along with himself "in order that she would be with him, when he died, and he would not be alone" (*id.* at 10).

Dr. O'Gorman characterized respondent as "quite factual and open, but very depressed and showed much tearing in talking about the episodes that led up to his present incarceration, particularly in talking about his ex-wife" (*id.* at 15-16). He further noted that respondent "has acknowledged the abnormalities of his behavior, and *he expresses a desire to accept capital punishment*" (*id.* at 16) (emphasis added). His report concluded that, "the patient is knowledgeable of the charges being made against him. He can assist his attorney in his own defense, *if he so desires.* He is fully cognizant of the penalties if convicted." (*Id.* at 17) (emphasis added).

B. The Plea and Sentencing Proceedings

On November 28, 1984, respondent next appeared before the trial court and at that time sought to withdraw his not guilty pleas and to plead guilty to all three counts of capital murder. (J.A. 19). Respondent also sought to discharge his counsel and thenceforth proceed *pro se* at the penalty phase of the proceedings (*id.* at 19-20). His stated reason was to prevent counsel from preparing and presenting any evidence in mitigation of the potential death sentences he faced on all three charges (*id.* at 32). Respondent wished to ensure that *no* mitigation evidence would be presented on his behalf (*id.*).

The trial judge thereupon inquired of the Public Defenders as to respondent's competence. (J.A. 20-21).

They provided the court with a copy of Dr. Jurasky's report (*id.*). While Dr. O'Gorman's report had not yet been prepared or submitted, the Public Defenders informed the court that they had spoken to Dr. O'Gorman and represented that "his findings are similar to Dr. Jurasky's" (*id.*).[2] Based upon Dr. Jurasky's report and counsels' representations regarding Dr. O'Gorman, the trial court thenceforth found respondent not only competent to "understand the nature of the . . . charges against him" and "to assist in his defense," but also that he "knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney." (*id.* at 21).[3]

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[2] The record is unclear whether the trial court actually ever saw Dr. O'Gorman's report, which was dated November 28, 1984 – the same date as respondent's guilty plea and waiver of counsel. Certainly, the plea minutes indicate that the court had not seen it at the time it accepted respondent's plea and waiver nor did counsel bring to the court's attention Dr. O'Gorman's conclusions that respondent was "very depressed" and "expresses a desire to accept capital punishment." (J.A. 15-16).

[3] Ironically, as noted by the court of appeals (Pet. App. A20-A21), the trial court made these latter two competency findings despite the fact that neither Dr. Jurasky nor Dr. O'Gorman evaluated respondent with respect to his abilities to understand the consequences of pleading guilty and waiving counsel in a capital case. *Compare Westbrook v. Arizona*, 384 U.S. 150 (1966) (competence to waive counsel calls for separate inquiry from competence to stand trial). Indeed, Dr. Jurasky's expressed suspicions as to the possible negative impact of respondent's remorse upon his ability to exert effort towards his own defense as well as Dr. O'Gorman's observation – unknown to the trial judge at the time he made his contrary finding – that respondent desired to accept capital punishment as a result of his severe depression renders the trial court's conclusory competency determination highly suspect.

The trial court thereupon conducted a canvass of respondent as to his waiver of his right to counsel. While ascertaining that respondent was a thirty year old high school graduate with no prior court experience (*id.* at 30), the court learned that respondent sought to discharge counsel and represent himself for quite unorthodox reasons, particularly in a capital case (*id.* at 32):

> [T]he Public Defenders and myself don't agree on the way they should defend me.
>
> * * *
>
> I don't want them to present any mitigating evidence. I don't want this presented, and they have to – they feel that they have to.

Immediately thereafter, when the trial court inquired whether he was under the influence of any drugs or alcohol, respondent replied (*id* at 33):

> Just what they give me in, you know, medication.

Significantly, the trial court asked no follow up questions in order to ascertain what specific medications respondent was presently taking, their dosages, the duration he had been on these medications and their possible impact on (or impairment of) his cognitive and volitional abilities at this most crucial stage of the trial proceedings. Instead, it simply proceeded to inquire whether respondent desired standby counsel (*id.* at 33).[4] The remainder

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[4] In point of fact, respondent was heavily medicated during the plea proceedings, having been placed on the prescription

of the waiver and plea colloquy consisted virtually entirely of respondent's largely monosyllabic responses to the trial court's catechismic enumeration of rights being waived and stock inquiries into promises or threats that might render the plea or waiver involuntary (*id* at 25-34, 39-40, 54-56; Pet. App. A9, A13-A14).

It is noteworthy that despite the fact that, for all intents and purposes, respondent was effectively "volunteering" for the imposition of three death sentences,[5] at no point in the plea and waiver proceedings did the trial court ever see fit to inquire into respondent's emotional comprehension and state of mind in discharging counsel, pleading guilty and refusing to present mitigating evidence to the sentencing court. Rather, the court contented itself simply with informing respondent of the rights he was waiving, inquiring whether he understood them and ascertaining whether any external forces – e.g., promises, threats, or the like – were exercising any undue influence on his decision.

At a subsequent hearing on December 17, 1984, the trial court once again advised respondent that it was "unwise" of him to waive his right to counsel and afforded him the opportunity to withdraw his guilty

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medications Phenobarbital, Dilantin, Inderal and Vistaril at the jail where he was being detained prior to trial. He was not taken off these medications until he was moved to state prison after sentencing, at which time he later testified that his head cleared (and for the first time he sought out counsel to prosecute an appeal from his conviction) (4/20/88 Tr. 32-35).

[5] *See* Welsh S. White, *The Death Penalty in the Nineties* ch. 8 (Defendants Who Elect Execution) (1991).

pleas. (12/17/84 Tr. 2). Respondent reiterated that he did not wish to reconsider either his guilty pleas or his waiver of counsel and that he did not want to present any witnesses in his behalf at the penalty phase. (*Id.* at 2-3).

On January 21, 1985, a capital sentencing hearing was held before a panel of three judges, pursuant to Nev. Rev. Stat. Ann. §175.552. At that hearing, respondent declined to cross-examine the State's witnesses or object to any of the evidence proffered by the State. Nor did he present any mitigating evidence in his behalf or make a closing statement in his behalf.[6] The three judge panel thereupon sentenced him to death on each of the three murder charges. (1/21/85 Tr. 165-66).

On March 31, 1987, the Supreme Court of Nevada affirmed respondent's death sentences for the Red Pearl Saloon murders but reversed the death sentence for the murder of his former wife, overturning the aggravating factors found by the sentencing panel and directing the imposition of a life sentence. Pet. App. C1-C16.

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[6] *Cf.* Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 Tenn. L. Rev. 95 (1987); Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 Colum. L. Rev. 130, 152-53 (1985) (the state's interest in avoiding arbitrary executions justifies the appointment of counsel over a defendant's objection at capital sentencing proceedings).

C. State Postconviction Proceedings

In July 1987, respondent sought postconviction relief in the Nevada state courts, arguing that his guilty pleas were involuntarily entered because he was under the influence of drugs at the time of the plea and because he was mentally incompetent to represent himself at the plea hearings. Pet. App. D2-D3, D6-D7.

At the evidentiary hearing held in state court, respondent testified that the reason he sought to have his public defenders dismissed was to prevent them from presenting any mitigating circumstances in the penalty phase of his trial to ensure that he received a death sentence. (4/20/88 Tr. 32-33). In response to the question whether it was his desire to represent himself or simply to end the proceedings and his life, respondent replied: "It wasn't – I didn't want to really represent myself. I was making sure that nobody was representing me." (*Id.* at Tr. 33).

Respondent also testified to having been administered Inderal, Dilantin, Phenobarbital and Vistaril in the Clark County Detention Center at the time of his plea (*id.* at Tr. 34) and to their impact on his mentation and mood (*id.* at Tr. 35):

> Q. [D]o you recall whether those drugs or medications had any affect upon your ability to know what was going on?
>
> A. I didn't think they did at the time because I was on the drugs. But now when I wasn't on them anymore, I could see that they, you know, had an affect on me.
>
> Q. And what affect did they have?

> A. I wouldn't know how to describe it. I guess I really didn't care about anything, you know, it wasn't – I wasn't very concerned about anything that was going on, you know, as far as the proceedings and everything were going.
>
> Q. And when did you get off of that medication?
>
> A. In the state prison.[7]

Relying on the facial sufficiency of the court's colloquy at the original plea proceedings, the state court rejected respondent's claims. Pet. App. D1-D12. Despite respondent's uncontroverted testimony as to his severe depression and the impact of the mood altering medications upon him as well as the corroborative medical records he introduced, the state postconviction court ruled that "defendant did not present evidence as to the effect on him of any drugs he may have ingested prior to the entry of the plea." *Id.* at D8. The state court also summarily rejected respondent's claim that he was mentally incompetent to represent himself, relying on the fact that he had previously been examined by two psychiatrists who had declared him competent to stand trial. *Id.*

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[7] Respondent's testimony concerning the medications he received and their impact on him was corroborated by the introduction into evidence of his medical records from the Clark County Detention Center, reflecting the medication and dosages he received, as well as the relevant excerpts from the latest edition of the Physician's Desk Reference (PDR) (42d ed. 1988), setting forth the properties and side effects of each of these medications, among them confusion, light-headedness, depression, hallucinations, short-term memory loss, drowsiness, tremors and convulsions. (J.A. 97-98; Pet. App. A14 & n.4).

Respondent appealed to the Supreme Court of Nevada, which denied relief. Pet. App. E1-E7. The Supreme Court similarly placed principal reliance on the facial validity of the plea colloquy. *Id.* at E5-E6. While recognizing that respondent had informed the trial court that he had been on medication the day he pleaded guilty and waived counsel, the Supreme Court dismissed the trial court's failure to make further inquiry, noting that "nothing in the record of the canvass" suggested that the trial judge "needed to inquire further into the nature of the effect of the medication." *Id.* at E6. The court also ignored respondent's testimony and proffer of medical evidence at the postconviction hearing, concluding that respondent "presented no evidence in the postconviction hearing which necessarily established that the medication influenced him to such an extent that he was unable to understand the meaning and consequences of his plea." *Id.* at E6-E7.

D. Federal Habeas Corpus Proceedings

(a) In December 1989, respondent filed a petition for a writ of habeas corpus (28 U.S.C. §2254) in the United States District Court for the District of Nevada, which denied the petition without an evidentiary hearing. Pet. App. B1-B22. Relying exclusively on the state court record, the district court held that the guilty pleas and waivers were voluntarily entered. *Id.* at B12-B18. Noting that the record did not reflect that the trial judge, the prosecutors or the two attorneys initially appointed to represent respondent felt that his faculties were impaired because of medication (*id.* at B13-B14), the district court concluded that respondent had not demonstrated that the

effect of those medications on him were such that he could not freely and voluntarily change his plea to guilty and dispense with counsel. (*Id.* at B13).

(b) The United States Court of Appeals for the Ninth Circuit reversed and directed issuance of the writ of habeas corpus. Pet. App. A1-A28. The court of appeals held that at where a defendant waived his right to counsel as well as the full panoply of rights waived by pleading guilty (especially in a capital case), the inquiry into waiver demands the "utmost solicitude" from the courts. *Id.* at A11-A12, *citing Boykin v. Alabama,* 395 U.S. 238, 243 (1969). This inquiry is doubly important where there is a bona fide doubt about defendant's competency to waive rights. *Id.*

The court of appeals found that a bona fide doubt existed in this case. It took note of respondent's suicide attempt a few months before his plea hearing, as well as the pretrial psychiatric reports with their references to respondent's depression, guilt and remorse coupled with both psychiatrists' expressed concern as to whether this might interfere with respondent's willingness to defend himself. Pet. App. A8, A13, A25-A28. These doubts only increased when respondent subsequently appeared in court, given his obviously suicidal desire to plead guilty to three capital crimes and to discharge counsel to ensure that no mitigating evidence would be presented on his behalf at sentencing. *Id.* at A8-A9, A13-A14. Nor were these doubts assuaged by respondent's monosyllabic responses to the trial court's waiver colloquy as well as his having taken four different kinds of medication, about which the trial court made no inquiry whatsoever. *Id.* at A8-A9, A13-A14.

In light of these factors, the court of appeals held that the state court should have entertained a good faith doubt about respondent's competency to make a voluntary, knowing and intelligent waiver of his constitutional rights. *Id.* at A12-A15. Due process therefore required the state trial court to have held a contemporaneous hearing – not just the usual plea colloquy – to evaluate and determine respondent's competency to waive constitutional rights, plead guilty and dismiss counsel. *Id.* at A15.

The court of appeals further held that the state court's failure to conduct a proper contemporaneous inquiry into respondent's competency to waive constitutional rights at the plea hearing was not cured by the postconviction hearing held three years later, both because the state postconviction court's ruling was premised on the wrong legal standard of competency and because an examination of the record in light of the correct legal standard failed to sustain the state court's retrospective finding that respondent was competent to waive his legal rights. *Id.* at A15-A16.

Relying on a long line of Ninth Circuit precedent, the court of appeals held that "[c]ompetency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial." *Id.* at A19. A defendant is competent to waive constitutional rights, the court explained, only if he has the capacity for "reasoned choice" among the alternatives available to him, whereas he is competent to stand trial as long as he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel." *Id.*

Analyzing the state postconviction court's competency determination, the court of appeals noted that the state court based its determination of respondent's competency to waive counsel solely on the basis of the earlier psychiatric evaluations of competency to stand trial. *Id.* at A20. This was improper, the court ruled, because both psychiatric examinations – which occurred several months before the plea colloquy – focused strictly on respondent's competence to stand trial. *Id.* "Neither doctor considered the question whether Moran was competent to waive counsel or to plead guilty. At the time of the examinations, Moran had not yet decided to do either, so the question of competency to waive constitutional rights was simply not before the doctors." *Id.* at A20-A21 & n.7.

Similarly, the state postconviction court's failure to articulate the standard of competency it used to evaluate respondent's competence to plead guilty (*id.* at A22), along with its single reference to the conventional standard for competence to stand trial, compelled the court of appeals to conclude that the state postconviction court applied the wrong legal standard to reach its conclusion that respondent was competent to plead guilty and waive counsel. *Id.* at A23-A24.

Independently analyzing the two psychiatric reports, the court of appeals noted that both reports recounted examinations occurring in September 1984, several months before respondent sought to discharge his attorneys and change his pleas. *Id.* at A25. Both reports focused entirely on respondent's mental state insofar as it related to his competence to stand trial, not his competence to waive counsel and plead guilty. *Id.* at A25-A28.

Moreover, neither report addressed the effects that medication would have on respondent's competence; thus, they were inadequate to resolve the question of the impact of respondent's heavily medicated condition on his competence to waive counsel and plead guilty. *Id.* at A27-A28.

Accordingly, finding the state courts to have applied an incorrect legal standard and considering the factual record in light of the appropriate standard, the court of appeals found it inadequate to demonstrate respondent's competence to plead guilty and waive counsel. *Id.* at A24-A28.

SUMMARY OF ARGUMENT

Certain rights of the accused are so fundamental to the fairness of the proceedings that they may not be waived absent the defendant's personal waiver. Among these are the right to counsel and the right to stand trial (or plead guilty). Trial courts are required to make detailed and probing personal inquiries before accepting waivers of these rights in order to determine that the waiver is knowing, intelligent and voluntary. A similar obligation extends to a defendant's mental competence to stand trial. Whenever evidence comes to light – from any source and at any stage of the proceedings – that casts a bona fide doubt on the defendant's competence, the trial court must conduct a thorough inquiry to determine if the defendant is impaired and unable to properly participate in the proceedings.

In this case, the court of appeals determined that a doubtfully competent capital defendant – who sought to plead guilty to three capital murder charges and discharge his lawyers to prevent them from presenting mitigating evidence in his behalf at sentencing – should not have been permitted to plead guilty and waive counsel absent a sufficiently exhaustive determination that he was mentally competent to make a "reasoned choice" among the alternatives available to him. The court of appeals held that where a doubtfully competent defendant sought to personally exercise his fundamental rights – and to exercise them in a patently self-destructive fashion – the general standard of mental competence – the ability to consult with counsel along with a rational and factual understanding of the proceedings – was inadequate to satisfy the high standard of voluntariness applicable to personal waivers of constitutional rights.

The court of appeals correctly applied decisions of this Court, including *Westbrook v. Arizona*, 384 U.S. 150 (1966), in requiring that a carefully particularized inquiry be made into any waiver of fundamental rights sought to be made by a defendant as to whom a bona fide doubt existed as to competence. Before accepting such a waiver, there must be an individualized functional inquiry into the defendant's mental state focused on the rights sought to be exercised or waived and an assessment of the factual and legal context in which the waiver occurs. Whether that inquiry be defined as a "higher" standard of competence (or "reasoned choice"), as suggested by the court of appeals, a contextualized inquiry into decisional competence, as suggested by commentators, or simply greater breadth of inquiry, as suggested in earlier

decisions of this Court, it clearly mandates that where a doubtfully competent defendant seeks to personally exercise or waive his rights, the judicial inquiry to be made must be extraordinarily penetrating and thorough.

In the case at bar, the court of appeals properly made an independent determination that the trial court erred in peremptorily accepting respondent's clearly suicidal guilty plea and waiver of counsel without having conducted a competency hearing as well as a far more exhaustive personal examination beyond the litany of the routine plea colloquy.

The ultimate issue of voluntariness of waiver of rights is a mixed fact-law determination. Where the state courts had not conducted an adequate hearing either at the plea or in postconviction proceedings in order to develop the material facts, where it employed a clearly incorrect legal standard and where the record as a whole failed to support its determination of respondent's competence and the voluntariness of his waivers, neither 2254(d)'s presumption of correctness or the *Maggio v. Fulford*, 462 U.S. 111 (1983) deference to be accorded state competency determinations required the court of appeals to defer to the state's determination in this case.

ARGUMENT

I. A FINDING OF COMPETENCE TO STAND TRIAL IS NOT CONSTITUTIONALLY ADEQUATE TO DETERMINE A CAPITAL DEFENDANT'S COMPETENCE TO PLEAD GUILTY, WAIVE COUNSEL AND WAIVE PRESENTATION OF MITIGATING EVIDENCE AT SENTENCING ABSENT PARTICULARIZED INQUIRY INTO THE DEFENDANT'S COMPETENCE AS WELL AS VOLUNTARINESS IN WAIVING THOSE RIGHTS

This Court has held repeatedly that a defendant possesses certain rights in a criminal trial that are so fundamental to the fairness of the proceedings that they may not be waived absent the personal participation and waiver of the defendant himself. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel); *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (accord). Moreover, the defendant's waiver may not be inadvertent or accidental, but may be accepted by the trial court only where knowingly, intelligently and voluntarily made. *Id.* Among these fundamental rights are the right to counsel, the right to stand trial, the right to a jury trial and the right against self-incrimination. *Faretta v. California*, 422 U.S. 806 (1975) (waiver of counsel/assertion of right of self-representation); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (guilty plea); *Brookhart v. Janis*, 384 U.S. 1 (1966) (whether to plead guilty); *Rock v. Arkansas*, 483 U.S. 44 (1987) (whether to testify); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (waiver of jury trial). No defendant gives up these rights except where he personally surrenders them in a knowing, purposeful and voluntary

fashion. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).[8]

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[8] As noted in *Jones v. Barnes*, 463 U.S. 745, 751 (1983), four "fundamental decisions" are traditionally committed to the accused (pleading guilty, waiving a jury, testifying and taking an appeal) as well as the decision to act as his own advocate (and waive counsel). Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – a Dead End?*, 86 Colum. L. Rev. 9, 10-12, 30-37 (1986) (contrasting roles of client and counsel in assertion and waiver of defendant's rights and management of defense); Edward L. Rubin, *Toward A General Theory of Waiver*, 28 UCLA L. Rev. 478, 491-504, 546-51 (1981); George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 260-68 (1977) (mental capacity to exercise waiver of rights).

Significantly, outside of those decisions specifically ear-marked for the defendant's personal assertion (and which call for particularized inquiry into defendant's waiver), the exercise and waiver of virtually all other rights of the accused are committed to the discretion of defense counsel, who may exercise or waive them with virtually no right of input from the defendant or the trial court and whose decisions ordinarily bind the accused. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501 (1976); *Francis v. Henderson*, 425 U.S. 536 (1976); *Henry v. Mississippi*, 379 U.S. 443, 451 (1965). Indeed, counsel's assertions (or waivers) of rights may bind the accused even when occurring negligently and inadvertently, *see Coleman v. Thompson*, 111 S. Ct. 2546 (1991), a standard that would never apply to defendant's personal waivers. Nevertheless, outside the context of those rights whose exercise is committed to the defendant's personal discretion, "it is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (and authorities cited therein). As discussed *infra*, this distinction is of critical importance in determining whether a defendant who may be mentally competent to assist counsel is nonetheless incompetent to exercise his rights in his own behalf.

In order to ensure that these rights are sedulously protected, this Court has mandated that trial courts make detailed and probing inquiry of defendants before accepting their waivers. The trial courts are required not only to inform the defendant of the rights he is waiving, but must also ascertain whether his waiver is being made with his eyes open and of his own free will. *See Patterson v. Illinois*, 487 U.S. 285, 298-99 (1988) ("recognizing the enormous importance and role that an attorney plays at the criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial").

In *Von Moltke v. Gillies*, 332 U.S. at 723-24, the Court articulated the exhaustive thoroughness with which the trial court must determine that a defendant's waiver is both knowing and voluntary:

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility . . . . A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.
>
> This case graphically illustrates that a mere routine inquiry – the asking of several standard questions followed by the signing of a standard written waiver of counsel form – may leave a

> judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.

This same standard of probing inquiry applies as well in the context of assessing the voluntariness of a guilty plea (with its attendant waiver of virtually all of the defendant's trial rights). *Boykin v. Alabama*, 395 U.S. at 242-44 (same standard of inquiry for guilty plea as for waiver of counsel: "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences"); *McCarthy v. United States*, 394 U.S. at 466 (waiver standard for guilty plea identical to *Zerbst* standard for waiver of counsel: "an intentional relinquishment or abandonment of a known right or privilege").[9]

A. Mental Competence in the Context of Waiver of Rights

No defendant may be tried (or permitted to waive his rights) who is not mentally competent to stand trial. *Medina v. California*, 112 S.Ct. 2572 (1992); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960). As

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[9] *See Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1071-72 (11th Cir. 1986) (Atkins, J., dissenting) ("The mandatory nature of the *Faretta* inquiry is justified because the Court has recognized that a defendant's decision to go *pro se* is tantamount to pleading guilty – the process is just a little slower and perhaps mo[r]e painful").

Justice Kennedy observed in *Riggins v. Nevada*, 112 S.Ct. 1810, 1817 (1992) (Kennedy, J., concurring):

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

The standard set forth in *Dusky* requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" as well as "a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402. In *Drope*, the Court applied the same standard in a state case, describing the test as whether the defendant possesses the capacity "to consult with counsel, and to assist in preparing his defense." 420 U.S. at 171.

Pate and *Drope* also place a continuing responsibility on the trial judge to investigate a defendant's mental competence to proceed, even absent objection by counsel, whenever evidence comes to light – from any source and at any stage of the proceedings – that casts a bona fide doubt on defendant's mental state and fitness to participate in the proceedings. *Pate*, 383 U.S. at 385-86; *Drope*, 420 U.S. at 179.

It is thus at the intersection of these two complementary lines of cases – those involving the close scrutiny required over both a defendant's personal waiver of fundamental rights as well as his mental competence to participate meaningfully in the proceedings – that the

Court's *per curiam* opinion in *Westbrook v. Arizona*, 384 U.S. 150 (1966) should be viewed.

In *Westbrook*, 384 U.S. at 150-51, the petitioner had received a hearing on his competence to stand trial but no hearing or inquiry whatever into his competence to waive counsel and conduct his own defense. Invoking the "protecting duty" requirement that it set out for the ascertainment of waivers of counsel in *Zerbst* and *Carnley v. Cochran*, 369 U.S. 506 (1962), the Court remanded for a plenary determination of whether this "protecting duty" had been fulfilled in light of *Pate*. *Id.* at 150-51. *Westbrook* held, in essence, that where a bona fide doubt existed as to a defendant's mental competence to stand trial, a separate and specific inquiry must also be made into the defendant's competence to waive fundamental rights where the defendant attempts such a waiver.

Westbrook thus reaffirmed the principle the Court had earlier recognized in *Massey v. Moore*, 348 U.S. 105 (1954), where it noted that a defendant "might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Id.* at 108.

Relying upon *Westbrook*, the Ninth Circuit in *Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973), held that, even though a defendant may in fact be competent to stand trial, he may not necessarily be sufficiently competent to plead guilty. Rather than the *Dusky* standard of competence to assist counsel, the Ninth Circuit determined that a defendant's competence to waive rights must be assessed "with specific reference to the gravity of the decisions with which the defendant is faced." *Id.* at 215.

Sieling adopted the standard first formulated by Judge Hufstedler in her dissent in *Schoeller v. Dunbar*, 423 F.2d 1183, 1194 (9th Cir. 1970):

> A defendant is not competent to plead guilty if mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea.

While courts and commentators are in dispute as to whether *Westbrook* mandates a "higher" standard of competence for a defendant's personal waiver or exercise of rights,[10] at an irreducible minimum it stands for the principle that competence to stand trial is not a unidimensional one-size-fits-all concept. While a determination that a defendant is competent to stand trial might mean that ordinarily he was also competent to personally exercise and waive his rights, it does not automatically resolve the issue. Rather, there must be an individualized functional inquiry into a defendant's mental state focused on the rights sought to be exercised or waived and an

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[10] *Compare Sieling v. Eyman*, 478 F.2d at 214-15; *United States v. Masthers*, 539 F.2d 721, 726 & n.30 (D.C. Cir. 1976); *United States v. David*, 511 F.2d 355, 362 n.19 (D.C. Cir. 1975); Silten & Tullis, 28 Hastings L. J. at 1065-74 (competence to plead guilty and waive counsel requires "higher" standard of comprehension than competence to stand trial) *with Allard v. Helgemoe*, 572 F.2d 1 (1st Cir. 1978); *United States ex rel. Heral v. Franzen*, 667 F.2d 633 (7th Cir. 1981) (competence to stand trial is competence for all purposes). Although *cf.* Note, *Competence To Plead Guilty And To Stand Trial: A New Standard When A Criminal Defendant Waives Counsel*, 68 Va. L. Rev. 1139, 1140, 1151-55 (1982) (competence to stand trial not necessarily synonymous with competence to waive counsel; higher standard of scrutiny clearly required where uncounseled defendant seeks to plead guilty).

assessment of the factual and legal context in which the waiver occurs. *See Drope*, 420 U.S. at 176 ("a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies"); *see also* Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behav. Sci. & L. 291, 298-301, 313 (1992); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. Miami L. Rev. (forthcoming 1993).[11]

As early commentators have noted (Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L.J. 1053, 1068 (1977)):

> The defendant who waives counsel will be alone when it becomes necessary to decide whether to testify or to decide matters involving trial procedures and strategy. He must therefore be able to determine the alternatives available to him during the proceedings, to evaluate these choices, and to decide for himself what action to take. He will not have guidance from an attorney and cannot depend upon the court to provide the assistance he would receive if he had counsel. In this situation, it is clear that the defendant must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.

Accordingly, given the scrupulous care with which guilty pleas and waivers of counsel ordinarily must be

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[11] Manuscript copies of Professor Bonnie's forthcoming Miami Law Review article are being placed on file with the Clerk.

scrutinized (*e.g., Zerbst, Von Moltke, Boykin, Faretta* and *Patterson*), the trial court must similarly exercise extraordinary vigilance before accepting a waiver of rights from a defendant as to whom there may be a bona fide doubt as to his mental competence. Whether that vigilance be defined as a "higher standard" or "reasoned choice," as the court of appeals has suggested (Pet. App. A19), a contextualized inquiry into decisional competence, as suggested by Professor Bonnie (10 Behav. Sci. & L. at 298-301; 47 U. Miami L. Rev.; Ms. at 15-17, 45-75) or simply greater breadth of inquiry (*Zerbst, Von Moltke, Westbrook*), it clearly mandates that where a doubtfully competent defendant seeks to personally exercise or waive his rights – particularly in a situation such as the case at bar, where he effectively seeks to exercise them in a patently self-destructive manner – the inquiry to be made must be extraordinarily penetrating and thorough. As formulated by the D.C. Circuit (*United States v. Masthers*, 539 F.2d at 726):

> A defendant's competency must be assessed "with specific reference to the gravity of the decisions with which [he] is faced." Whether an accused is capable of making the "reasoned choice" essential to the validity of a guilty plea and the waiver of constitutional rights such as the plea entails "depend[s] . . . upon the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." (Citations omitted).[12]

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[12] Death-waiver cases such as *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Lenhard v. Wolff*, 443 U.S. 1306 (1979); and *Demosthenes v. Baal*, 495 U.S. 731 (1990) are not directly applicable in this con-

Commentators and courts recognize that competence is not a one-dimensional concept, but varies according to the factual and legal circumstances in which it is to be assessed (Bonnie, 10 Behav. Sci. & L. at 299):

> It is now axiomatic that a person may be competent for one purpose, such as decision-making about medical treatment, but not about others, such as the management of financial affairs. Tests of competence, and the procedures required to resolve doubts about competence, vary from context to context, depending upon both normative and practical considerations. Adherence to the idea that a criminal defendant is competent for all decision-making purposes, or for none, would be anomalous in the face of such a pervasive understanding.[13]

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text. These cases involve convicted defendants' post-trial waivers of appellate or postconviction review, not the waiver of trial rights at the "main event" of the criminal proceedings (*Wainwright v. Sykes*, 433 U.S. at 90), where such waivers must be strictly scrutinized. *Patterson v. Illinois*, 487 U.S. at 298-99.

[13] As one psychiatrist has framed the inquiry:

> In deciding competency, one should consider . . . whether competency for only a specific act is to be judged (e.g., executing a will or some particular business transaction). It is important that the psychiatrist not consider competence generally but understand that the question is, instead, 'competence for what particular purpose.' Therefore, his mental status examination should be tailored to throw light upon the specific question.

G. Ulett, *A Synopsis of Contemporary Psychiatry* 337-38 (5th ed. 1972) *quoted in* Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237, 308 n.249 (1974); *see also* G. Richard Strafer, *Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 876-86 (1983).

Indeed, while Petitioner notes that various courts have formally rejected the *Sieling* "reasoned choice" formulation with respect to guilty pleas,[14] it is instructive that many of those self-same courts have nonetheless, on a case-by-case basis, sustained findings that a defendant found competent to stand trial nonetheless may not be competent either to represent himself or to plead guilty, given the extraordinarily high standards required for waiver (or assertion) of these rights. *See, e.g., Blackmon v. Armontrout*, 875 F.2d 164 (8th Cir. 1989) (defendant competent to stand trial not competent to represent himself); *Matusiak v. Kelly*, 786 F.2d 536, 543-44 (2d Cir. 1986) (defendant competent to stand trial not competent to plead guilty); *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 753 (2d Cir. 1975) (defendant competent to stand trial not competent to represent himself); *Government of Virgin Islands v. Niles*, 295 F. Supp. 266 (D.V.I. 1969) (defendant competent to stand trial not competent to represent himself); *State v. Shank*, 410 So. 2d 232, 233 (La. 1982) ("a defendant's election to represent himself for the

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[14] Although, as Judge Cudahy observed in *United States v. Clark*, 943 F.2d 775, 785-86 (7th Cir. 1991) (Cudahy, J., concurring), the majority of circuits have nonetheless read *Westbrock* as imposing a higher standard of competence on defendants seeking to discharge counsel and represent themselves. *See, e.g., United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133 (2d Cir. 1975); *Chapman v. United States*, 553 F.2d 886, 892 n.10 (5th Cir. 1977); *United States v. McDowell*, 814 F.2d 245, 250 (6th Cir. 1987); *Blackmon v. Armontrout*, 875 F.2d at 166; *Evans v. Raines*, 800 F.2d 884, 885 (9th Cir. 1986).

purpose of acquiescing in his conviction of a capital offense and in his death sentence cannot be sanctioned as an intelligent choice"); *People v. Chadd*, 621 P.2d 837, 844 (Cal. 1981) (defendant's "suicidal" guilty plea and waiver of counsel in capital case overturned); *State v. Doss*, 568 P.2d 1054, 1058 (Ariz. 1977) (competent defendant "too emotionally disturbed to make knowing waiver" of counsel); *State v. Bauer*, 245 N.W.2d 848, 859 (Minn. 1976) (competent defendant's "paranoid distrust" of appointed counsel and judicial system renders waiver of counsel not knowing or intelligent); *McCarlo v. State*, 677 P.2d 1268, 1270 (Alaska Ct. App. 1984) (competent mental retardate not competent to plead guilty). *See also* Bonnie, 47 U. Miami L. Rev.; Ms. at 31 & n.72 (and cases collected therein).[15]

These cases clearly demonstrate that, irrespective of the formal test to be applied, competence to stand trial is not a uniform standard which necessarily enables a defendant to act in his own behalf without the guiding hand and assistance of counsel in the preparation and presentation of his defense. This may well explain the critical reference in *Dusky* and *Drope* to the necessity for a

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[15] Indeed, in the analogous context of assertion (or waiver) of the insanity defense, various courts have similarly held that a defendant's competence to stand trial *simpliciter* is not necessarily dispositive for all purposes and that particularized inquiry may be necessary in evaluating the defendant's competence to waive the defense where its assertion would otherwise be called for. *See Frendak v. United States*, 408 A.2d 364, 372-80 (D.C. 1979); *Treece v. State*, 547 A.2d 1054, 1057-63 (Md. 1988) (and authorities cited therein); *United States v. Wright*, 627 F.2d 1300, 1307 n.45, 1309-12 (D.C. Cir. 1980).

defendant to possess the capacity to "consult with counsel and to assist in preparing his defense." *Dusky*, 362 U.S. at 402; *Drope*, 420 U.S. at 171.

While the Sixth Amendment speaks of providing a defendant with "the Assistance of Counsel," the practical realities of criminal litigation suggest that, in point of fact, it is the defendant assisting counsel, who is charged with full responsibility for mounting the defense. *Jones v. Barnes*, 463 U.S. at 751; *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988). *See* Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 Calif. L. Rev. 636, 638-49 (1977).[16]

Under these circumstances, and with counsel charged with the primary responsibility for asserting (and protecting) defendant's rights, Professor Bonnie's suggestion that a defendant's competence to assist counsel is not necessarily coextensive with his decisional competence to

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[16] Petitioner's (and the Solicitor General's) fears that acceptance of a "dual standard" could create an anomalous class of defendants competent to stand trial but not competent to plead guilty or waive counsel are wholly misplaced. If anything, refusal to allow a defendant to plead guilty or waive counsel because of doubts as to his competence would mean that the trial court was exercising its "protecting duty" (*Zerbst; Westbrook*) in assuring that all of the defendant's trial protections (including counsel) would be preserved in the interests both of the defendant and the integrity of the judicial process. Moreover, it should be remembered that a defendant adjudged incompetent cannot waive his rights (*Pate*, 383 U.S. at 386), there exists no constitutional right to plead guilty (*Alford*, 400 U.S. at 38 n.11) and even a defendant's constitutional right of self-representation is not absolute and may be supervened by compelling governmental interests (*Faretta*, 422 U.S. at 834 n.46).

exercise rights on his own behalf carries considerable force. Bonnie, 10 Behav. Sci. & L. at 294 ("a distinction between a foundational concept of competence to assist counsel and a contextualized concept of decisional competence."); Bonnie, 47 U. Miami L. Rev.; Ms. at 15-17, 45-75.

Clearly, as Professor Bonnie and *amicus* American Psychiatric Association *et al.* (APA Br. 11) recognize, what matters is not the precise wording of the test, but rather whether the formulation assures a sufficiently broad clinical and judicial inquiry into what the defendant understands and whether he can perform the tasks and functions required of him in the context of his case. Certainly, as numerous courts have already determined, there area not insubstantial number of defendants who may be competent to perform the tasks necessary to assist counsel in mounting their defense who would, nonetheless, be wholly unable to cope with the responsibilities and challenges facing them if they insisted upon going it alone. *Massey v. Moore*, 348 U.S. at 108. Nor have the lower courts found it particularly onerous in differentiating competence for different purposes. *See* cases cited *supra* at 29-30 & nn.14 & 15.

Accordingly, pursuant to *Westbrook*, the court of appeals correctly determined that particularized inquiry separate and apart from inquiry into competence to stand trial is constitutionally compelled where a doubtfully competent capital defendant sought to plead guilty to three murder charges and discharge counsel for the express purpose of preventing them from presenting mitigating evidence in his behalf. Mechanical application of

the *Dusky* standard, as relied upon by the state courts in this case, was wholly inadequate in that regard.[17]

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[17] Notwithstanding Petitioner's half-hearted suggestion, neither *Teague v. Lane*, 489 U.S. 288 (1989) nor its progeny have any application in this case. Pet. Br. at 22 n.1. In the first place, the State never before raised the *Teague* issue either in the lower federal courts or in its certiorari petition to this Court. The argument is thus waived. *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990) (*Teague* not jurisdictional; subject to waiver by State); *Parke v. Raley*, 113 S.Ct. 517, 521 (1992) (accord); *see also id.* at 522-23; *Yee v. City of Escondido*, 112 S.Ct. 1522, 1531-33 (1992) (failure to raise issue in lower courts or in certiorari petition deemed waiver). Significantly, neither the Solicitor General nor the Criminal Justice Legal Foundation, as *amici* in support of Petitioner, suggest that *Teague* or its progeny have any application in this case.

More to the point, the issue to be resolved in this case – the standard of care by which courts must scrutinize a doubtfully competent defendant's waivers of rights in the trial context – is a principle of long standing consideration by this Court, calling for the straight forward application of fundamental legal principles enunciated in cases long predating respondent's 1984 guilty plea and waiver of counsel; *e.g., Zerbst* (1938); *Pate* (1966); *Westbrook* (1966); *Boykin* (1969); *Drope* (1975); and *Faretta* (1975). Whatever the Court's ultimate decision, it would not constitute a "new rule" under *Teague*. *See, e.g., Stringer v. Black*, 112 S.Ct. 1130, 1135-40 (1992) (*Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (1990) did not so extend precedent or break new ground, even when applied in different statutory or factual contexts, as to create new rules); *see especially Wright v. West*, 112 S.Ct. 2482, 2499 (1992) (Kennedy, J., concurring in the judgment) ("Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."); *see also id.* at 2497 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring in the judgment); *id.* at 2502 (Souter, J., concurring in the judgment.)

Indeed, the "reasoned choice" formulation enunciated in *Sieling v. Eyman, supra*, a federal habeas corpus case, has been the

B. The Trial Court's Plea Inquiry Was Wholly Inadequate To Ascertain Respondent's Competence And Voluntariness In Pleading Guilty And Waiving Counsel

In this case, the guilty plea and waiver of counsel were tendered by a defendant who the trial court knew from the pretrial psychiatric evaluations had attempted suicide several months earlier, was a chronic alcohol and drug abuser and whose psychiatric evaluations pronounced him seriously depressed, albeit mentally competent to proceed to trial, assuming – as did the psychiatric examiners – that he had the guiding hand of counsel at his side.[18]

When respondent stood before the trial court, however, he immediately sought to plead guilty to all charges and discharge counsel, setting forth his counsels' insistence on the presentation of mitigating evidence at sentencing as his reason for discharging them.

Nonetheless, despite this "flurry of warning flags" (*Saddler v. United States*, 531 F.2d 83, 87 (2d Cir. 1976)), the

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constitutional standard consistently applied in the Ninth Circuit since 1973 – well over a decade prior to respondent's 1984 plea and waiver. *See, e.g., Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981); *de Kaplany v. Enomoto*, 540 F.2d 975, 985 (9th Cir. 1976) (en banc). Thus, its application in this case hardly constituted either the creation or retroactive application of a "new" rule.

[18] It should be remembered, as noted by the court of appeals (Pet. App. A25-A28), that the psychiatric evaluations never focused on respondent's competence to plead guilty, waive counsel or attempt a "suicidal" waiver of his trial rights because the issue had not yet arisen at that early stage of the proceedings.

trial court summarily found respondent competent without a hearing and accepted his guilty pleas and waivers after a plea colloquy of almost breath-taking brevity, characterized primarily by respondent's monosyllabic responses to a numbing litany of "yes/no" questions posed by the trial court.[19]

Given the constellation of symptoms presented by respondent – the severe depression, the suicide attempt, the chronic alcohol and drug abuse (particularly in the period immediately preceding the three murders), and the unspecified medication taken that day – the trial court erred in not having made further inquiry into respondent's emotional comprehension and state of mind before accepting his quasi-suicidal guilty plea and waiver of counsel. *Compare Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of trial, a

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[19] Indeed, even after respondent informed the court that he was presently taking medication, the trial court did not even pause long enough to ask a single follow-up question in order to ascertain the identities and dosages of the medications or to inquire into their possible impact on respondent's thought processes or mood. Certainly, the impact of medication on a defendant's competence – particularly on his ability to cooperate with counsel – cannot be gainsaid. *Riggins v. Nevada*, 112 S.Ct. at 1817-20 (Kennedy, J., concurring).

Clearly, had this plea been tendered in federal court, the trial court's failure to follow up with specific inquiry into defendant's medications and their effects on him would have resulted in flat-out reversal and vacatur of the plea. *See, e.g., United States v. Parra-Ibanez*, 936 F. 2d 588, 594-96 (1st Cir. 1991); *United States v. Rossillo*, 853 F.2d 1062, 1064-67 (2d Cir. 1988); *United States v. Cole*, 813 F.2d 43, 45-47 (3d Cir. 1987).

trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial").

Under *Pate, Drope* and especially *Westbrook*, the trial court committed clear error in accepting this guilty plea and waiver of counsel without first having held a hearing and sought a more precisely focused psychiatric evaluation in determining whether respondent's obviously suicidal desire to plead guilty and discharge counsel was the product of mental illness, which seriously affected his ability to make a "reasoned choice" among the legal alternative available to him, as well as effectively rendering him unable to cooperate with counsel. *See Drope*, 420 U.S. at 176 (psychiatric evaluation must be properly focused on relevant legal inquiry).

While this Court has observed that the relationship between mental illness and suicide is problematic (*Drope*, 420 U.S. at 180-81 & n.16), there nonetheless exists substantial support in the psychiatric literature corroborating that certain categories of suicide (and suicidal behavior) are causally related to affective (mood) disorders.

Clinical research over the last thirty years has conclusively confirmed the close correlation among manic-depressive illness, alcohol and drug abuse and suicide. *See, e.g.*, Frederick K. Goodwin and Kay R. Jamison, *Manic-Depressive Illness* 210-226 ("Alcohol and Drug Abuse in Manic-Depressive Illness") (1990); *id.* at 227-244 ("Suicide"); *American Psychiatric Press Textbook of Psychiatry* ("Am. Psych. Text.") 1021-35 (John A. Talbott, Robert E. Hales, Stuart C. Yudofsky, eds. 1988) (affective illness, substance abuse and suicide) (collecting authorities); Kay

Redfield Jamison, *Touched With Fire: Manic-Depressive Illness and the Artistic Temperament* 37-47 & nn. 74-108 (collecting authorities) (1993).

These research studies indicate that manic-depressive illness and substance abuse are associated with more than two-thirds of all completed suicides; affective illness, usually major depression, is identified in 40 to 80 percent of the victims in two major studies and alcoholism in 20 to 30 percent. *Am. Psych. Text., supra*, at 1025-26 (collecting authorities); Goodwin & Jamison, *supra*, at 227-44 (collecting authorities); Jamison, *supra*, at 37-47 (collecting authorities). Moreover, these studies are quite consistent in finding elevated rates of alcohol and drug abuse in individuals with manic-depressive illness in both the manic and depressive phases. Goodwin & Jamison, *supra*, at 210-26; Jamison, *supra*, 37-39 & nn. 74-86. As one leading researcher recently noted (Jamison, *supra*, at 41-42):

> In addition to drinking and using drugs to excess, individuals with depressive and manic-depressive illness are also far more likely to commit suicide than individuals in any other psychiatric or medical risk group. The mortality rate for untreated manic-depressive illness is higher than it is for many types of heart disease and cancer.
>
> * * *
>
> Suicide, for many who suffer from untreated manic-depressive illness, is as much "wired" into the disease as myocardial infarction is for those who have occluded coronary arteries. Because suicide appears more volitional, somehow more existentially caused, and more tied to external circumstance than it often actually is,

> the seriousness of manic-depressive illness as a potentially lethal medical condition is frequently overlooked.[20]

The trial court's complete failure even to consider the impact of respondent's severe depression on his clearly suicidal "volunteering" for execution – particularly where the issue was flagged in the earlier psychiatric evaluations – was clearly violative of *Pate, Drope* and *Westbrook*. In assessing the substantial impact of depressive disorders (and suicidal ideation) on a defendant's ability to participate meaningfully in his defense, the "Competency to Stand Trial Instrument," designed by Dr. Louis McGarry and the Laboratory of Community Psychiatry of the Harvard Medical School, lists thirteen functions "related to what is required of a defendant in criminal proceedings in order that he may adequately cope with and protect himself in such proceedings." Among these is the category "self-defeating v. self-serving motivation (legal sense)." Laboratory of Community Psychiatry, Harvard Medical School, Final Report, *reprinted in* Center for Studies of Crime and Delinquency, National Institute of Mental Health, *Competency to Stand Trial and Mental Illness* 99-103 (1973).

As described by the Laboratory, this coping mechanism often is manifested by the intentional abandonment of legal safeguards (*id.* at 103):

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[20] For an ineffably graphic factual account of the impact of severe depression on a capital defendant's suicidal waiver of rights (albeit in a postconviction context), *see Rumbaugh v. Procunier*, 753 F.2d 395, 397, 399-403 (5th Cir. 1985); *see also id.* at 403-10 (Goldberg, J., dissenting).

> This item calls for an assessment of the accused's motivation to adequately protect himself and appropriately utilize legal safeguards to this end. It is recognized that accused persons may appropriately be motivated to seek expiation and appropriate punishment in their trials. At issue here is the pathological seeking of punishment and the deliberate failure of the accused to avail himself of appropriate legal protections. Passivity or indifference do not justify low scores on this item. Actively self-destructive manipulation of the legal process arising from mental pathology does justify low scores.[21]

Indeed, this case stands in marked contrast with *Alford's* observation that a guilty plea should be viewed as "the product of a free and rational choice, especially when the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." 400 U.S. at 31. Here, of course, respondent went effectively unrepresented at the plea, discharging counsel specifically to prevent them from acting in his interests at plea and sentencing. By no conceivable stretch of the imagination, then, could this non-plea bargained guilty plea to three capital murder charges and waiver of counsel be deemed to have been to

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[21] *See* Bonnie, 47 U. Miami L. Rev.; Ms. 11 ("the underlying issue is whether the defendant has the abilities needed for self-interested decision-making"); *see also*, in this regard, the analogous psychiatric authority cited at 28-29 n.9 of the Solicitor General's Brief, as well as the Solicitor General's concession that "the 'volitional' or 'affective' aspects of a defendant's capacity to participate in the trial process . . . are inherently part of the assessment of a defendant's competence to stand trial." (*Id.* at 28).

respondent's advantage. *See especially United States v. Johns*, 728 F.2d 953, 956-57 (7th Cir. 1984) (defendant's waiver of counsel, monosyllabic responses at colloquies, silence at sentencing and guilty plea at early stage of proceedings with no attempt at plea bargaining raised bona fide doubt about her competence).

Nor was the trial court's actual colloquy with respondent adequate to elicit all the relevant facts and circumstances surrounding what one court has referred to as a "defendant's basic desire to commit suicide" with "the cooperation of the State in that endeavor" (*People v. Chadd*, 621 P.2d at 839). *See also Faretta*, 422 U.S. at 840 (Burger, C.J., dissenting) ("The system of criminal justice should not be available as an instrument of self-destruction").

As this Court has framed the relevant inquiry, "[t]he question is not *whether* the petitioner made a knowing decision ... but *why*." *Harrison v. United States*, 392 U.S. 219, 223 (1968) (emphasis in original). *See also United States ex rel. Brown v. LaVallee*, 424 F.2d 457, 460 (2d Cir. 1970).

Here, the "why" went effectively unanswered, largely because the trial court failed to conduct a properly exhaustive inquiry. *See United States v. Kincaid*, 362 F.2d 939, 941 (4th Cir. 1966) (Rule 11 "requires something more than conclusionary questions phrased in the language of the Rule. It contemplates such an inquiry as will develop the underlying facts from which the court will draw its own conclusions.") *See also* Note, *Competence to Plead Guilty: A New Standard*, 1974 Duke L.J. 149, 158-59 (customary plea colloquy, which ordinarily focuses on the

impact of external factors on defendant's decision, not necessarily adequate to probe defendant's state of mind or mental capacity as it affects plea or waiver).[22]

Clearly, the trial court's *Westbrook* inquiry was wholly inadequate in this case. Its reliance on earlier psychiatric evaluations of respondent's competence was wholly misplaced – both because the psychiatrists had evaluated respondent only with respect to his competence to stand trial and face adversarial proceedings with counsel – not waive his legal rights self-destructively – and because they had never evaluated respondent with respect to the impact of medication on his competence to make decisions and work in a cooperative manner with counsel. Given respondent's psychiatric profile – as set forth in both doctors' reports – the trial court's summary plea colloquy in this case was wholly inadequate to satisfy even the foundational competence standard of *Dusky, Pate and Drope*, much less the particularized inquiry demanded by *Westbrook*.

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[22] *See also State v. Chavis*, 644 P.2d 1202, 1205 (Wash. Ct. App. 1982) (emphasis in original):

> Since the question ultimately is the *subjective* understanding of the accused rather than the quality or content of the explanation provided, the court should question the accused in a manner designed to reveal *understanding*, rather than framing questions that call for simple "yes" or "no" response.

II. THE FEDERAL COURT PROPERLY MADE AN INDEPENDENT DETERMINATION OF COMPETENCE AND VOLUNTARINESS WHERE THE STATE COURTS RELIED ON AN INCORRECT LEGAL STANDARD, WHERE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AND WHERE THE RECORD AS A WHOLE DID NOT SUPPORT THE STATE'S DETERMINATION

Petitioner belatedly[23] claims that the state court's 1987 postconviction habeas findings retrospectively cured the constitutional deficiencies in the trial court's failure to conduct a contemporaneous inquiry into respondent's competence at the time of his 1984 plea and waiver. Based upon these state postconviction proceedings, Petitioner asserts that the federal court of appeals should have been precluded from making an independent inquiry into the factual and legal basis for respondent's constitutional claims.[24]

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[23] As a preliminary matter, it is questionable whether this issue is even properly before the Court. As conceded by *amicus* Criminal Justice Legal Foundation (CJLF Br. at 4-5), the issue was not raised as a Question Presented either in the petition for certiorari or in Petitioner's Brief. On that basis alone, the Court is justified in refusing to consider it. Robert Stern, Eugene Gressman, Steven Shapiro, *Supreme Court Practice* 363-64 (6th ed. 1986); *Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari").

[24] While *amicus* CJLF similarly complains that the state courts are the "better" forum for the resolution of these legal questions, the short answer is that Congress, by its 1966 recodification of 28 U.S.C. §2254 and its subsequent repeated refusals to adopt more deferential standards of review, obviously intends that federal courts should continue to have plenary power to relitigate constitutional questions that have nonetheless previously received state court consideration. *See Wright v. West*, 112 S.Ct. at 2497-98 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring).

This is disingenuous in the extreme. As the court of appeals quite properly determined, the state postconviction proceeding was not entitled to the degree of deference ordinarily accorded under 28 U.S.C. §2254(d) because its ruling was premised on the wrong legal standard, material facts were not adequately developed in the state courts and, when reviewed under the proper standard, the record as a whole simply did not demonstrate that respondent was competent to waive his rights. (Pet. App. A15-A16, A20-A28).

While a federal habeas court ordinarily must accord deference to findings of fact made by the state courts after full and fair hearings (28 U.S.C. §2254(d)), no presumption of correctness applies where the state courts have utilized an erroneous legal standard, where the material facts have not been adequately developed or where the state court record, as a whole, does not fairly support the state court's factual determination. 28 U.S.C. §2254(d)(1), (3), (6), (8). This federal deference to state court determinations, of course, applies only to matters of "historical" fact and to factual inferences to be drawn from historical fact; it does not apply to questions of law or to mixed questions of fact and law. *Miller v. Fenton*, 474 U.S. 104, 112-18 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983).[25]

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[25] While federal courts must also accord deference to state court determinations of, e.g., demeanor, that does not mean

The voluntariness of a guilty plea (or waiver of other equally fundamental rights), however, is a complex determination that this Court has determined involves mixed questions of law and fact. Accordingly, voluntariness determinations are entitled to independent federal review. *Miller v. Fenton, supra; Marshall v. Lonberger, supra; see Boykin v. Alabama*, 395 U.S. at 243 (the ultimate "question of an effective waiver of a federal constitutional right in a proceeding is . . . governed by federal standards."); *Matusiak v. Kelly*, 786 F.2d at 543-45.

While competence to stand trial has been determined by this Court to be a question of fact subject to 2254(d)'s presumption of correctness (*Maggio v. Fulford*, 462 U.S. 111 (1983)), competence is nonetheless but one aspect of the global issue of voluntariness where guilty pleas and waivers of rights are involved. *Matusiak*, 786 F.2d at 543 ("for the plea to be voluntary, '[i]t is axiomatic' that the defendant must at least be competent to proceed (citation omitted); . . . must have an awareness of the true nature

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blind obedience. Even this Court has observed that demeanor evidence is by no means dispositive in competence determinations. *Pate*, 383 U.S. at 386; *see, e.g., Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("the trial court and Bouchillon's attorney did not have the extended contact of a full trial from which to evaluate his behavior, but rather only the limited contact pursuant to a guilty plea. Their observations concerning his demeanor must therefore be less meaningful."); *Griffin v. Lockhart*, 935 F.2d 926, 931 (8th Cir. 1991) ("although a trial court is better able than we are to judge the demeanor of an accused, the transcript reveals statements by Griffin that contribute to a doubt about his competency (e.g., addiction to medication, depression, threatened suicide)").

of the charge against him (citation omitted); have a 'rational as well as factual understanding of the proceedings against him' (citation omitted); and have knowledge of the nature of the constitutional protections he will forgo by entering his plea (citation omitted)"). Under these circumstances, it is clear that the intermingled questions of both competence and voluntariness affecting respondent's guilty pleas and waivers of counsel implicate serious questions of both fact and law.

Nonetheless, on the basis of this record, it is clear that the state courts misapplied the relevant standard of law, considering defendant competent for all purposes based strictly upon his having been examined by two psychiatrists – even though their examination was limited to his competence to stand trial with counsel. The psychiatric examiners, however, never were called upon to assess respondent's competence in light of his subsequent suicidal guilty plea and self-destructive discharge of counsel. Nor did the trial court conduct an independent assessment in light of these changed circumstances.

Irrespective of the competence standard ultimately settled upon, the record is clear that at no time did the state courts make the requisite inquiry into respondent's competence to waive counsel constitutionally compelled by *Westbrook*. The state court thus clearly erred when it improperly treated competence to plead guilty and waive counsel as resolved merely by reference to competence to stand trial, with no separate consideration given to a *Westbrook* inquiry. Moreover, given the shortcomings of the trial judge's fact-finding as well as the shortcomings of the psychiatric evaluations on which the state court relied – which were clearly material to the question

before the court – any state court determinations that relied upon them certainly would not carry the presumption of correctness. *Hays v. Murphy*, 663 F.2d 1004, 1008 n.4 (10th Cir. 1981); *Suggs v. LaVallee*, 570 F.2d 1092, 1113-15 (2d Cir. 1978); *Matusiak v. Kelly*, 786 F.2d at 544-45.

Nor did the postconviction hearing vitiate the taint. The state court's one sentence conclusion spoke only in terms of the *Dusky* standard and the court summarily ignored the corroborative medical records that were presented which confirmed respondent's testimony.

Accordingly, neither the one-sentence conclusion of the state postconviction court nor any findings of fact that can fairly be implied from it are thus entitled to deference because the state postconviction court used an incorrect legal standard. *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); *Rogers v. Richmond*, 365 U.S. 534, 547 (1961).[26]

It is axiomatic, then, that the court of appeals was well within its authority to review and reassess the state court record in this case. The ultimate question of voluntariness of respondent's guilty plea and waiver of counsel was precisely the kind of mixed fact-law question that

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[26] Indeed, it is questionable whether, as a matter of law, the 1987 state postconviction court could meaningfully determine respondent's competence in 1984 in light of this Court's repeatedly expressed disinclination to sanction retrospective determination of competence years after the event. *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 386-87.

calls for independent federal review. Insofar as the mental competence issue was intertwined with the voluntariness question, the state court's inadequate fact-finding and reliance on an improper legal standard deprived its competence determination of whatever deference it might otherwise have been accorded under 2254(d). In these circumstances, the court of appeals review of both questions was eminently proper.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 92-725

In the Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, WARDEN, PETITIONER

v.

RICHARD ALLAN MORAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the state court applied an incorrect standard of competence when it permitted respondent to plead guilty and waive his right to the assistance of counsel.

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A. Louis McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 Am. J. Psychiatry 623 (1965) 28
Ames Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 Am. J. Psychiatry 616 (1965) 13, 28
Ronald Roesch and Stephen Golding, *Competency to Stand Trial* (1980) 28
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether a court's determination of a defendant's competence to waive the assistance of counsel and to plead guilty to a criminal charge is governed by a more stringent standard than the determination of the defendant's competence to stand trial. This issue has arisen in federal as well as state criminal cases. The United States therefore has a law enforcement interest in the outcome of this case.

STATEMENT

1. In the early morning hours of August 2, 1984, respondent and a companion entered the Red Pearl

Saloon in Carson City, Nevada, and fatally shot the bartender and a customer. Respondent then instructed his companion to help him take money from the premises. Pet. App. B3, C5-C6.

Nine days later, respondent entered the apartment of his former wife and fatally shot her. He then shot himself in the abdomen and attempted unsuccessfully to slit his wrists. When the police arrived at the scene, respondent claimed that intruders were responsible for the carnage. Two days later, however, he summoned the police to his hospital room and confessed to all three murders. Pet. App. C6-C8.

2. Respondent was charged with three counts of first-degree murder and other crimes. Respondent pleaded not guilty to the charges, and the court ordered him to be examined by two psychiatrists. After their examinations, the psychiatrists concluded that respondent was legally competent. Pet. App. D6, A24-A28.[1]

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[1] Dr. William D. O'Gorman found that respondent had a "normal personality" and was "quite factual and open," although he appeared depressed about his conduct and expressed "a desire to accept capital punishment." O'Gorman Report 2-3. Based on his examination, Dr. O'Gorman expressed the opinion that respondent was "knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, if he so desires. He is fully cognizant of the penalties if convicted." *Id.* at 3.

Dr. Jack A. Jurasky described respondent as coherent; he observed that respondent's capacity to pay attention and to concentrate was good and that his judgment was "within normal limits." Jurasky Report 2. He described respondent's mood as "depressed but appropriate" and stated that "[t]here is not the slightest doubt in my mind" that respondent was "in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give

After being informed that the State would seek the death penalty, respondent advised the court that he wanted to discharge his attorneys, waive the right to the assistance of counsel, and plead guilty to all three murders. 11/28/84 Tr. 2, 3-4. Based on the psychiatrists' reports, the trial court concluded that respondent "is competent in that he knew the nature and quality of his acts, * * * understands the nature of the criminal charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter." *Id.* at 3-4. The court further found that respondent was aware of "the consequences of entering a plea of guilty to the charges" and that he could "intelligently and knowingly waive his constitutional right to assistance of an attorney." *Id.* at 4.

The court advised respondent of his right to counsel, enumerated the dangers and disadvantages of self-representation, and inquired into respondent's understanding of the proceedings and the consequences of waiving counsel. 11/28/84 Tr. 4-11. Respondent acknowledged that he had discussed with his attorneys the charges against him and possible defenses to those charges. *Id.* at 9. When asked why he wished to waive counsel, respondent explained: "I don't want them to present any mitigating evidence

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testimony if called upon to do so." *Id.* at 2-3. Dr. Jurasky concluded (*id.* at 3):

> Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense but I do not feel that it is necessarily a major consideration. It is the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy.

[at the death penalty phase]. I don't want this presented, and * * * they feel that they have to." *Id.* at 11. When the court asked if respondent was then under the influence of any drug or alcohol, respondent replied that he was on medication.[2] *Id.* at 12. The court then discharged respondent's attorney and accepted his waiver of counsel. *Id.* at 12-13.

The court allowed respondent to withdraw his pleas of not guilty and to enter guilty pleas. 11/28/84 Tr. 14-16. After conducting a lengthy inquiry, *id.* at 16-36, the court determined that respondent was not pleading guilty in response to threats or promises; that he understood the nature of the charges against him and the consequences of pleading guilty, including the possibility that he would receive the death penalty; that he was aware of the rights he was relinquishing; and that he acknowledged the factual basis for the pleas.

At a subsequent hearing, the court advised respondent that it was "unwise" of him to waive his right to counsel and afforded him the opportunity to withdraw his guilty pleas. 12/17/84 Tr. 2. Respondent stated that he did not wish to reconsider either his waiver of counsel or his guilty pleas and that he did not want to present any witnesses in his behalf at the death penalty phase. *Id.* at 2-3.

At the sentencing hearing before a three-judge panel on January 21, 1985, respondent declined to cross-examine the State's witnesses or to present any mitigating evidence on his own behalf. 1/21/85 Tr. 161, 162. The court sentenced respondent to death on each of the three murder charges. *Id.* at 165, 166. On

[2] Although respondent did not tell the court which medications he was taking, those medications were inderal, dilantin, phenobarbitol, and vistaril, which had been prescribed to control cocaine-induced seizures. See Pet. App. A14 n.4, D4.

appeal, the Supreme Court of Nevada affirmed respondent's death sentences for the two saloon murders, but reversed the death sentence for the murder of his former wife and remanded the case to the trial court for resentencing. Pet. App. C1-C16.

3. Four months later, respondent sought post-conviction relief in state court, arguing for the first time that his guilty pleas "were involuntarily entered" because he was under the influence of medication and was incompetent to waive counsel and represent himself. Pet. App. D2-D3, D6-D7. After an evidentiary hearing at which respondent testified, the state court rejected his claim. *Id.* at D1-D12. The court found that respondent was "thoroughly canvassed" by the trial court, that he knowingly and voluntarily waived his right to counsel, and that "he fully understood the proceedings," *id.* at D5-D6. The court upheld the trial court's finding of competence, noting that the two psychiatrists who had examined respondent had found him competent. *Id.* at D6, D8. With respect to respondent's claim concerning the medication he was taking at the time he entered his guilty pleas, the court observed that the trial court was aware that respondent was taking medication, and it noted that at the evidentiary hearing respondent did not present any evidence to suggest that the medication had affected his mental capacity. *Id.* at D8.

Respondent took an appeal to the Supreme Court of Nevada, which denied relief. Pet. App. E1-E7. The court found that the trial court had adequately questioned respondent concerning "his understanding of the possible consequences of a guilty plea, the voluntariness of the plea, the elements of the charged crimes, the possible punishments, and his rights at trial and during the penalty phase." *Id.* at E6. The

court further observed that "nothing in the record of the canvass in any way suggests that [respondent] was unable to comprehend what was going on," or that the trial court needed to inquire further into the effect of the medication respondent was taking. *Ibid.* The court explained that respondent "presented no medical evidence in the post-conviction hearing which necessarily established that the medication influenced him to such an extent that he was unable to understand the meaning and consequences of his plea." *Id.* at E6-E7.

4. In 1989, respondent filed a petition for a writ of habeas corpus in federal district court, claiming that he was incompetent to plead guilty or to waive counsel. The court concluded that respondent's guilty pleas were voluntarily entered, Pet. App. B13, and that his waiver of counsel was knowing and intelligent, *id.* at B18. The court noted that respondent had failed to present any evidence to show that the medications he was taking at the time of his guilty pleas deprived him of the capacity "to freely and voluntarily decide for himself that he wanted to ignore the advice of his appointed counsel and change his plea to guilty." *Id.* at B13. The court further observed that "the record does not reflect that the judge, the prosecutor, or the two attorneys initially appointed to represent [respondent] felt that his mental faculties were impaired because of the medications he had consumed." *Id.* at B13-B14.

5. The court of appeals reversed. Pet. App. A1-A28. The court first held that the state court should have conducted a hearing "to evaluate and determine [respondent's] competency to waive constitutional rights before it accepted [his] decision to discharge counsel and change his pleas." *Id.* at A15. Relying

on previous Ninth Circuit decisions, the court of appeals stated that "[c]ompetency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial." *Id.* at A19. A defendant is competent to waive constitutional rights, the court explained, only if he has the capacity for "reasoned choice" among the alternatives available to him, whereas he is competent to stand trial if he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel." *Ibid.*

The court of appeals concluded that "the state court erroneously applied the standard for evaluating competency to stand trial, instead of the correct 'reasoned choice' standard." Pet. App. A20. The two psychiatrists' evaluations, the court explained, "cannot support a finding that [respondent] was mentally capable of the reasoned choice required for a valid waiver of constitutional rights." *Id.* at A24. The court noted that the evaluations were "couched in terms relevant to [respondent's] competency to stand trial * * * [and] sa[id] nothing pertinent to [his] capacity for a reasoned choice among alternatives," *id.* at A28; that they failed to address the effect of the medication, *id.* at A27-A28; and that one of them was based on an examination that occurred several months before the guilty plea proceeding, *id.* at A25. Accordingly, the court of appeals concluded that "the postconviction order issued by the state court does not constitute a valid finding that in November 1984 [respondent] was competent when he discharged his counsel and changed his pleas to guilty." *Id.* at A23. The court therefore directed that the writ of habeas corpus issue unless the State allowed respondent to withdraw his guilty pleas and proceed to trial with the assistance of counsel. *Id.* at A28.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Dusky* v. *United States*, 362 U.S. 402 (1960) (per curiam), this Court held that due process prohibits a court from trying a defendant unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." In *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975), the Court applied the same standard in a state case, describing the test as whether the defendant possesses the capacity "to consult with counsel, and to assist in preparing his defense." See also *Medina* v. *California*, 112 S. Ct. 2572, 2579 (1992); *Pate* v. *Robinson*, 383 U.S. 375, 388 (1966) (Harlan, J., dissenting). That test is now universally applied in determining whether a defendant is competent to stand trial. See Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 376-379 (1985).

The court of appeals held that the traditional *Dusky* standard does not apply in determining whether a defendant is competent to plead guilty or to waive his right to counsel. Instead, the court held, the proper standard for those decisions, as well as for the waiver of other constitutional rights, is whether the defendant has the capacity for "reasoned choice" among the alternatives available to him—a standard that the court described as more stringent than the one for determining competence to stand trial.

This Court should not follow the Ninth Circuit's invitation to create multiple tests for competence in the criminal trial setting. A decision that a defendant is competent to stand trial should establish that he is competent to participate fully in his trial by making

each of the various decisions that he may be called upon to make in the course of his defense. To hold that a defendant is competent to be tried but incompetent to perform the tasks essential to the conduct of his defense would deprive the defendant of some of the very choices that the Constitution was designed to protect. Competence should be established by a single standard under which the court must determine whether the defendant has the mental capacity to understand the proceedings and participate in the trial. After finding the defendant competent, the court may still decline to accept his guilty plea or waiver of counsel, but that decision should be made under the "knowing and intelligent waiver" standard that is applied whenever a defendant seeks to waive his rights to go to trial and to be represented by counsel.

The state court properly permitted respondent to waive his right to counsel and enter pleas of guilty. Based on the reports of the two psychiatrists who examined respondent, the court found respondent competent under the traditional *Dusky* standard. In addition, the court found that respondent acted knowingly and intelligently in seeking to waive counsel and to plead guilty to the murder charges against him. The court's careful inquiries support its conclusion that respondent was competent and that his waivers were constitutionally valid.

ARGUMENT

THE STATE COURT DID NOT APPLY AN INCORRECT STANDARD OF COMPETENCE IN PERMITTING RESPONDENT TO PLEAD GUILTY AND TO WAIVE HIS RIGHT TO THE ASSISTANCE OF COUNSEL

A. A Finding That A Defendant Is Competent To Stand Trial Establishes That He Is Competent To Enter A Plea Of Guilty And To Waive The Right To Counsel

A defendant's competence to stand trial is measured by his ability to understand the proceedings against him and to perform particular tasks necessary to assisting in his defense. See, *e.g.*, Peter Silten and Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L.J. 1053, 1060 (1977) ("the narrow purpose of the *Dusky* test is to determine the effect, if any, that a defendant's mental impairment can be expected to have on his ability to function adequately during trial"); *ABA Criminal Justice Mental Health Standards* § 7-4.1 (Commentary), at 171 (1989) (determination of competence under the *Dusky* formulation involves "an evaluation of a particular defendant's skills").

If a defendant is competent to stand trial under that standard, he is also competent to waive counsel and to enter a guilty plea. That is because the mental abilities needed to make decisions concerning the conduct of one's defense are the same as those needed to make decisions about whether to plead guilty or waive counsel. The decision whether to plead guilty or not guilty and the decision whether to be represented by counsel or to proceed pro se are perhaps the two most basic decisions that a defendant must make in the course of conducting his defense.

Thus, in order to satisfy the traditional "understand and assist" test of competence to stand trial, a defendant must at least possess the kind of decisionmaking capacity that is needed to make fundamental choices such as whether to plead guilty and whether to accept the assistance of counsel.

The Ninth Circuit's dual standard for competence is particularly unjustified in the case of guilty pleas or waivers of counsel, because there is already in place a body of law designed to ensure that those important decisions are made voluntarily, with an appreciation of their significance and consequences. In *Boykin* v. *Alabama*, 395 U.S. 238, 244 (1969), the Court imposed an affirmative duty on trial judges to conduct an on-the-record examination of a defendant who seeks to plead guilty in order to ascertain that he "has a full understanding of what the plea connotes and of its consequence[s]." In the federal system, that requirement is codified in Fed. R. Crim P. 11(c), which provides that before accepting a plea of guilty the district court must determine that the defendant understands (1) the nature of the charges and the potential sentence to which he is subject; (2) that he has a right to be represented by counsel at every stage of the proceedings; (3) that he has a right to plead not guilty, the right to be tried by a jury, the right against compelled self-incrimination, and the right to confront and cross-examine the witnesses against him; and (4) that if the guilty plea is accepted there will not be a further trial of any kind.

Similarly, the Court has imposed on trial courts an affirmative duty to determine that a waiver of counsel is "intelligently and understandingly" made. *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962). See

also *Faretta* v. *California*, 422 U.S. 806, 835 (1975); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). The defendant must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'" *Faretta*, 422 U.S. at 835, quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

Accordingly, in every case in which a defendant pleads guilty or waives counsel, the trial court is compelled to go beyond the question of the defendant's capacity to comprehend what he is doing and to make a determination that he has an actual understanding of the nature and consequences of his choice. The determination that a defendant understands the nature and consequences of waiving his rights necessarily implies that he is competent to do so. See *Chapman* v. *United States*, 553 F.2d 886, 892 n.10 (5th Cir. 1977) (suggesting that the question whether a defendant is competent to waive counsel may be "wholly encompassed within the *Johnson* v. *Zerbst* test"); see also *United States* v. *Clark*, 943 F.2d 775, 780 (7th Cir. 1991) petition for cert. pending, No. 92-6439 (filed Oct. 30, 1992); *United States* v. *McDowell*, 814 F.2d 245, 250 (6th Cir.), cert. denied, 484 U.S. 980 (1987); *United States ex rel. McGough* v. *Hewitt*, 528 F.2d 339, 342 n.2 (3d Cir. 1975). There is thus no need for a separate determination of a defendant's competence to waive counsel and plead guilty in a case such as this one, where the trial court determined that the defendant was competent to stand trial under the *Dusky* standard and that he knowingly and understandingly waived his rights.

1. Even apart from the requirement that a court find a defendant's guilty plea to be voluntary and

intelligent, there is no sound reason why a defendant who has been adjudged competent to stand trial should not be deemed competent to enter a guilty plea. Implicit in a court's finding that a defendant is competent to stand trial is the conclusion that he is competent to decide to plead not guilty and to take the risks involved in following that strategy.[3] Of course, because a decision to stand trial is a decision not to plead guilty, the level of competence required to decide to stand trial should logically be the same as that required to decide whether to enter a guilty plea. In each case, the defendant must consider the same potential risks and benefits. With respect to each decision, the defendant is called upon to appreciate the strength of the government's case, to review the available defenses, and to assess the likely penalties upon conviction.

To be sure, the decision to plead guilty is a profound one, with more certain and immediate consequences than the decision to proceed to trial. That does not mean, however, that the decision to plead guilty is more difficult, requiring a higher level of competence. To the contrary, entering a plea of guilty may entail significantly fewer complications than participating in the conduct of a trial. A defendant at trial faces a number of decisions concerning trial strategy and tactics that, although not individually as momentous

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[3] A defendant's ability to decide how to plead has been identified as an important criterion for determining his competence to stand trial. See Ames Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 Am. J. Psychiatry 616, 618 (1965); Laboratory of Community Psychiatry, Harvard Medical School, Final Report, *Competency To Stand Trial and Mental Illness* 99-103, 106 (1973); Bennett, *supra*, 53 Geo. Wash. L. Rev. at 377 nn.11, 12.

as the decision to plead guilty, are at least as complex, and may be compounded over a period of days or weeks. With the assistance of counsel, a defendant at trial must decide whether to put on a defense, whether to raise an affirmative defense, which witnesses to call, how to challenge the government's case, and—ordinarily most difficult of all—whether to testify in his own behalf. If a defendant is competent to make each of those decisions, it is difficult to understand why he is not equally competent to make the single decision to plead guilty.

Consistent with this analysis, every federal circuit that has addressed the issue, except the Ninth and District of Columbia Circuits,[4] has concluded that the degree of competence required to plead guilty is the same as that required to stand trial, and that a separate competency finding is not required before the defendant is permitted to plead guilty. See *United States* v. *Simmons*, 961 F.2d 183, 187 (11th Cir. 1992); *White Hawk* v. *Solem*, 693 F.2d 825, 829-830 n.7 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983); *United States ex rel. Heral* v. *Franzen*, 667 F.2d 633, 637-638 (7th Cir. 1981); *Allard* v. *Helgemoe*, 572 F.2d 1, 4-5 (1st Cir.), cert. denied, 439 U.S. 858 (1978); *United States ex rel. McGough* v. *Hewitt*, 528 F.2d at 342 n.2; *Malinauskas* v. *United States*, 505 F.2d 649, 652-654 (5th Cir. 1974); *United States* v. *Harlan*, 480 F.2d 515, 517 (6th Cir.), cert. denied, 414 U.S. 1006 (1973); *Wolf* v. *United States*, 430 F.2d 443 (10th Cir. 1970); *United States* v. *Valentino*, 283 F.2d 634 (2d Cir. 1960). Those

[4] See *United States* v. *Masthers*, 539 F.2d 721, 726 (D.C. Cir. 1976); *Sieling* v. *Eyman*, 478 F.2d 211, 215 (9th Cir. 1973).

courts have recognized that the degree of competence needed to satisfy the *Dusky* "understand and assist" test is sufficient to satisfy constitutional concerns by ensuring that the defendant has the capacity to understand the meaning of pleading guilty and the consequences of doing so.

2. Similar analysis applies to a defendant's decision to waive the assistance of counsel. Competence to make that decision should not be tested by a more stringent standard than competence to stand trial, because the decision to waive counsel is no more demanding than other decisions to forgo constitutional rights that a defendant may be called upon to make in the course of the proceedings against him. Those decisions can include whether to demand a jury trial, whether to testify, and whether to dismiss or replace an attorney once the proceedings are under way.

It has been suggested that competence to waive counsel should be measured by a "vaguely higher" standard than competence to stand trial, because representing oneself in any further proceedings requires greater powers of comprehension, judgment, and reason than a defendant needs to stand trial with the aid of an attorney. See, *e.g.*, *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 133 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); *United States* v. *McDowell*, 814 F.2d at 250; *Blackmon* v. *Armontrout*, 875 F.2d 164 (8th Cir.), cert. denied, 493 U.S. 939 (1989); see also Silten and Tullis, *supra*, 28 Hastings L.J. at 1073 (The higher standard of mental competence to waive counsel is required "not because of the waiver decision itself but because the trial court's acceptance of the defendant's waiver of counsel must include the finding that the defendant is competent to act as his own counsel.").

The premise of the argument that it should be more difficult for defendants to waive counsel is faulty. As this case illustrates, a defendant's choice to forgo counsel's advice does not necessarily entail his active self-representation during trial. Respondent did not intend to represent himself at trial, but intended to plead guilty. Thus, even assuming that the ability to conduct a defense at trial requires some higher level of functioning than the ability to provide meaningful assistance to counsel, the higher standard would have no application in a case such as this one, in which the defendant intends to plead guilty rather than contest his guilt at trial, and in which he does not intend to contest the State's showing at the penalty stage.

Even when an accused waives the right to counsel for the purpose of actively representing himself, he should not be held to a higher standard of mental competence than a defendant who proceeds to trial with counsel's assistance. In *Faretta* v. *California*, 422 U.S. 806 (1975), the Court did not explicitly address the level of competence required for a defendant to waive counsel; the Court, however, declined to condition the validity of such a waiver on the trial court's assessment of the defendant's ability to conduct his own defense. Rather, in according independent constitutional standing to the right of self-representation, the Court recognized that an accused who manages his own defense "relinquishes * * * many of the traditional benefits associated with the right to counsel." *Id.* at 835. In formulating a standard for a valid waiver of counsel, the Court focused not on the defendant's ability to act as his own lawyer, but on the safeguards that must surround the process of deciding whether to forgo counsel, holding

that the court's only duty is to ensure that the decision is "knowing and intelligent." *Ibid.*, citing *Johnson* v. *Zerbst*, 304 U.S. at 464-465.

Because *Faretta* does not base the validity of the waiver on the ability of the defendant adequately to represent himself, application of a "heightened" standard of competence to the waiver decision cannot be justified by a concern for the quality of the defendant's self-representation. Under *Faretta*, the use of such a standard would place an unnecessary—and arguably impermissible—burden on a defendant's right to represent himself.

This conclusion comports with the historical roots of the *Dusky* competence rule. The requirement that a defendant have the mental capacity to stand trial arose at a time when a defendant did not have a right to counsel. Since it was contemplated that the defendant would often be conducting his own defense, see *Betts* v. *Brady*, 316 U.S. 455, 464-467 (1942), it was held that he could not be brought to trial if he lacked the mental capacity to understand the proceedings and defend himself. As Blackstone explained, "if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?" 4 W. Blackstone, *Commentaries* *24; see also *Yountsey* v. *United States*, 97 F. 937, 940-942 (6th Cir. 1989). As the court stated in *People* v. *Reason*, 334 N.E.2d 572, 574 (N.Y. 1975), in light of the historical origins of the rule against trying an incompetent defendant "it would be difficult to say that a standard which was designed to determine whether a defendant was capable of defending himself, is inadequate when he chooses to conduct his own defense."

3. Not only would adoption of the different standards of competence formulated by the Ninth Circuit be at odds with historical understanding, but it would

lead to perverse results, and in some cases could actually work to the detriment of the defendant. A defendant who was found competent to stand trial but not competent to plead guilty might be denied the opportunity available to other defendants to obtain leniency through plea bargaining. See *United States ex rel. Heral* v. *Franzen*, 667 F.2d at 638; *Allard* v. *Helgemoe*, 572 F.2d at 4; *Sharp* v. *Scully*, 509 F. Supp. 493, 495 (S.D.N.Y. 1981). "Such a result, in the name of constitutional protection, would be anomalous to say the least." *Franzen*, 667 F.2d at 638.

The court of appeals held that a defendant found incompetent under the "reasoned choice" standard not only could not plead guilty, but also could not waive other constitutional rights. Yet to deprive the defendant of the ability to waive rights such as the right to a jury trial, the right to confront witnesses, and the right to testify on the ground that he does not have the capacity to make a "reasoned choice" with respect to the waiver decision could seriously handicap the conduct of his defense. For example, a defendant who was found incompetent to waive his right to a jury trial would presumably be denied the right to request a bench trial, even though he might benefit from pursuing that course. And the case of a defendant found incompetent to make a "reasoned choice" regarding whether to testify would present an especially vexing problem: because a defendant has both a constitutional right to testify and a constitutional right to remain silent,[5] he is required to waive one or the other right regardless of which course he

[5] See *Rock* v. *Arkansas*, 483 U.S. 44, 51-53 (1987); *Hoffman* v. *United States*, 341 U.S. 479, 485-486 (1951).

takes. Strict adherence to the Ninth Circuit's dual competency standard thus could result in a court's not being able to proceed at all, even though it had found the defendant competent to stand trial.

4. The mischief of the Ninth Circuit's "reasoned choice" standard for guilty pleas and waivers of constitutional rights is compounded by the practical difficulties of applying that test. The Ninth Circuit described that standard as more stringent than *Dusky*, but did not shed light on how it would work in practice. And it is difficult to discern how the capacity to make a "reasoned choice" to waive a constitutional right differs from the ability to attain a "rational understanding" of the proceedings and to consult with and assist an attorney. See *United States* v. *Clark*, 943 F.2d at 780 (distinction between two standards is "very difficult to ascertain"); *United States ex rel. Heral* v. *Franzen*, 667 F.2d at 637 ("How these two standards differ as a practical matter is far from clear."); *Sharp* v. *Scully*, 509 F. Supp. at 495 (adoption of "different and higher standard of mental competency for pleading guilty than for proceeding to trial" would force psychiatrists and judges "to draw lines that are in fact too fine to be determined").

The practical difficulties are particularly apparent with respect to the application of the Ninth Circuit's standard to waivers of counsel, where even the courts that have adopted the Ninth Circuit's test have conceded that it is ill-defined. See *United States* v. *McDowell*, 814 F.2d at 250 (degree of competence necessary to waive counsel is "vaguely higher" than that required to stand trial); *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d at 133 (same). Indeed, even respondent regards the difference as

more a matter of "terminology" than substance. Br. in Opp. 4. If that is so, it is hard to find any justification in the principles of due process for the creation of a new category of competence, the main effect of which will be to make trial procedure more complicated and to create a new ground for courts to fall into constitutional error.

5. None of this Court's decisions supports the Ninth Circuit's creation of a separate competency test for pleading guilty. With respect to the creation of a separate test for waiving counsel, two of this Court's decisions appear to provide support for the Ninth Circuit's ruling. On close examination, however, those decisions do not compel affirmance of the Ninth Circuit's decision, even on the issue of the standard to be applied to waivers of counsel.

In *Massey* v. *Moore*, 348 U.S. 105 (1954), the defendant was convicted in state court and sentenced to life imprisonment after a trial at which he was not represented by an attorney and made no attempt to conduct a defense. He sought federal collateral relief on the ground that, in light of his mental condition, he should have been provided with counsel at trial. The lower courts denied relief, holding that the defendant had not demonstrated that it violated due process to try him without counsel. This Court remanded for a hearing to determine whether the defendant was competent to be tried without counsel. 348 U.S. at 108-109. In the course of its brief discussion of the point, the Court stated that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Id.* at 108.

In context, it appears that the Court's statement was not meant to create multiple competency stand-

ards, but to establish that, in determining whether it violated due process to deny counsel to a defendant, it was not enough to show that the defendant was minimally competent to stand trial. In the years before this Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the question whether the denial of counsel violated due process was decided on a case-by-case basis; a violation was declared if the Court found "special circumstances" in a particular case requiring counsel in order to ensure the fairness of the proceedings. See *Gideon* v. *Wainwright*, 372 U.S. at 349-351 (Harlan, J., concurring). The holding of *Massey* is that the State may not deny counsel to an indigent defendant if, in light of the defendant's mental condition, the appointment of counsel was necessary to ensure a fair trial. That is a very different proposition, however, from the one embraced by the Ninth Circuit: that a defendant who satisfies the *Dusky* test for competence to stand trial may nonetheless be incompetent to waive his right to counsel after he has been afforded that right.

The second case that bears on the standard of competence for waiving the right to counsel is *Westbrook* v. *Arizona*, 384 U.S. 150 (1966) (per curiam). In *Westbrook*, the trial court found the defendant competent to stand trial on the basis of an examination by three psychiatrists. At the beginning of his trial, and apparently without any further inquiry by the court, the defendant discharged his attorneys and proceeded to represent himself. See *State* v. *Westbrook*, 406 P.2d 388, 390-393 (Ariz. 1965). In a brief per curiam opinion, this Court vacated the defendant's conviction and remanded, stating that "[a]lthough petitioner received a hearing on the issue of his competence to stand trial, there appears

to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." 384 U.S. at 150. The Court then cited *Johnson* v. *Zerbst*, *supra*, and *Carnley* v. *Cochran*, *supra*, for the proposition that trial courts have a responsibility to ascertain that any waiver of counsel is "intelligent and competent." 384 U.S. at 150.

Although the decision in *Westbrook* is "ambiguous," *United States ex rel. McGough* v. *Hewitt*, 528 F.2d at 342 n.2, it should not be taken to establish that a defendant's competence to waive the right to counsel is subject to a stricter test than the one set forth in *Dusky*. The Court in *Westbrook* did not suggest that a different standard for competence was to be employed on remand, and in fact the Court's use of the term "competence" in connection with the waiver of counsel appears to have been a shorthand reference to the *Johnson* v. *Zerbst* standard for determining the validity of the waiver. The Court's principal concern seems to have been with the state court's failure to inquire whether the defendant was sufficiently aware of the right he was relinquishing and the consequences of doing so, since there was no record of any inquiry into these matters. See *People* v. *Reason*, 334 N.E.2d at 575 (the *Westbrook* Court was "more concerned about the fact that there was nothing in the record to indicate that the trial court had queried the defendant in accordance with *Johnson* v. *Zerbst* * * * to determine whether his waiver of counsel was intelligently made").[6]

[6] To the extent that *Westbrook* could be read to suggest that a defendant may not waive the assistance of counsel without satisfying a "higher" standard of competency, it is questionable whether that decision survives *Faretta* v. *California*, *supra*, where the Court for the first time recognized a constitutional right of self-representation and held that a court may not refuse to accept a waiver of the right to counsel on the ground that the waiver is improvident. In any event, *Westbrook* by its terms applies only to a defendant who waives counsel and "proceed[s] * * * to conduct his own defense." 384 U.S. at 150. See *Splitt* v. *United States*, 364 F.2d 594, 598 (6th Cir. 1966), cert. denied, 385 U.S. 1019 (1967) (*Westbrook* has no relevance to the situation in which a defendant waives counsel and pleads guilty); *United States* v. *Clark*, 943 F.2d at 780. Thus, *Westbrook* would, at most, require a court to conduct a separate inquiry into a defendant's ability to act as his own lawyer—an inquiry that would be unnecessary in this case, in which respondent pleaded guilty and declined to participate in further proceedings.

The Ninth Circuit has previously relied on this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), to support its adoption of the "reasoned choice" competency standard. *Sieling* v. *Eyman*, 478 F.2d 211, 215 n.2 (9th Cir. 1973). That case, however, provides no support for the Ninth Circuit's rule. In *Rees*, the defendant's attorney expressed doubt about his client's competence to make the decision to withdraw a petition to this Court to review his state conviction. This Court directed the district court to determine whether the defendant had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." 384 U.S. at 314.

The Court in *Rees* did not suggest that the defendant's capacity to make a "rational choice" to abandon his petition involved a greater degree of competence than would be necessary for him to stand trial; the Court appeared instead simply to be adapting the

Dusky competency test to the circumstances of that case. As we have noted, an individual's ability to choose among options is, in practice, one of the criteria that determines whether a person meets the "understand and assist" test for competence.

In sum, nothing in the principles of due process or any of this Court's cases requires that trial courts reassess a defendant's competence when he seeks to plead guilty or waive his right to counsel. The *Dusky* standard, supplemented by the traditional protections against involuntary and unknowing waivers of the right to counsel and the right to trial, is sufficient to ensure that the proceedings against the defendant are not fundamentally unfair.

B. The State Court Correctly Determined That Respondent's Guilty Plea Was Valid And That He Knowingly And Voluntarily Waived His Right To Counsel

Based on its consideration of the psychiatrists' reports, the state trial court concluded that respondent "understands the nature of the criminal charges against him" and "is able to assist in his defense." 11/28/84 Tr. 3. Because the court recognized that the issue for decision was not primarily respondent's competence to stand trial, but his capacity to enter a valid guilty plea and waive his right to counsel, the court went on to address those questions directly: it concluded that respondent "knows the consequences of entering a plea of guilty" and that he "can intelligently and knowingly waive his constitutional right to assistance of an attorney." *Id.* at 3-4.[7] With

[7] Both the psychiatrists and the state court made findings that respondent satisfied the elements of the "understand and assist" test. However, the court never explicitly stated, in so many words, that respondent was competent to stand trial. Rather, the court directly addressed his competence to plead guilty and to waive counsel. This is not to say, however, that if the court had actually pronounced respondent competent to stand trial, it would have been required separately to consider the issue of competence to plead guilty or to waive constitutional rights, or to make explicit findings with respect to the capacity to make those decisions. Rather, a valid finding of competence to stand trial should suffice as a matter of law to establish competence to make the other decisions as well. Thus, although a court must also satisfy itself that a guilty plea or waiver is knowing and voluntary, "[n]o additional competency determination need be made." *United States* v. *Clark*, 943 F.2d at 782; *United States ex rel. McGough* v. *Hewitt*, 528 at 342 n.2; see also *People* v. *Reason*, 334 N.E.2d at 575 (a determination that a waiver of counsel was "knowing and intelligent," coupled with "the finding that the defendant was mentally competent to stand trial, is sufficient to show that the trial court properly allowed the defendant to represent himself").

respect to the guilty plea, the court ascertained that respondent had "a full understanding of what the [guilty] plea connotes and of its consequence[s]." *Boykin* v. *Alabama*, 395 U.S. at 244. Likewise, the court adequately discharged its responsibility to determine that the waiver of counsel was voluntary and knowing. It conducted a lengthy colloquy with respondent in which it explained in detail the nature of the proceedings and ascertained that respondent understood "the dangers and disadvantages of self-representation" and the consequences of his choice. *Faretta* v. *California*, 422 U.S. at 835.

Nothing in the court's colloquy with respondent gave it reason to doubt that respondent's plea and his decision to forgo counsel were voluntary, knowing, and intelligent. Likewise, there was no reason

for the court to question respondent's competence to make those decisions. Respondent offered a plausible explanation for his desire to waive counsel, see 11/28/84 Tr. 11, and he was able to conduct a coherent discussion with the court on the question whether he committed the murders deliberately and with premeditation. *Id.* at 30-31. The evidence that respondent understood the nature and consequences of his waivers provided support for the conclusion that he was competent to proceed. See *United States* v. *Clark*, 943 F.2d at 781; *United States* v. *McDowell*, 814 F.2d at 250; *Chapman* v. *United States*, 553 F.2d at 892 n.10.

Respondent challenges the court's determination of competence on the ground that the physicians' reports failed to analyze the effect of his drug and alcohol abuse, his recent suicide attempt, and the seizure medication he was taking at the time of his guilty plea hearing. Br. in Opp. 9-10. Respondent also questions whether there was adequate consideration of respondent's "remorse and depression" and its effect on his ability "rationally to forego the protection of a trial and representation by counsel." *Id.* at 10.

Contrary to respondent's contention, the psychiatrists' reports addressed at length the possible effects of his prior drug and alcohol abuse. One of the psychiatrists specifically noted that although respondent's drug history may have selectively impaired his memory, it had not affected his judgment, his concentration, or his cognitive abilities generally. Jurasky Report at 2-3. The psychiatrists also took note of respondent's recent suicide attempt and commented on his "sad and moderately depressed" mood and his expressions of remorse for his crimes. *Ibid.*; see also O'Gorman Report at 3. Neither psychiatrist, however, viewed respondent's response to his situation as inappropriate or indicative of mental derangement or disorder, nor did either regard respondent's decisionmaking ability as impaired.

Respondent's willingness to accept the punishment of death was not, as respondent suggests, definitive evidence of his incompetence or mental disability. While the great majority of defendants seek to avoid or mitigate any punishment for their offenses, it is not proof of mental impairment that a defendant decides to accept the punishment society has prescribed for his conduct.[*] Finally, respondent's guilty plea and waiver of counsel are not rendered invalid by the court's failure to inquire into the effects of the medications that were prescribed for him. The court had the opportunity to observe respondent after being informed that he was on medication, and it found nothing in his demeanor or behavior to indicate that the drugs were having an adverse effect. Nor has respondent ever pointed to any evidence that the medication he was taking affected his competence. Under these circumstances, the state courts properly declined

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[*] As the Chief Justice has stated in a related context, see *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312-1313 (1979) (Rehnquist, Circuit Justice):

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

to require the state trial court to conduct any further inquiry into the possibility that the medications were impairing respondent's judgment.

Respondent also implies (see Br. in Opp. 10) that the *Dusky* "understand and assist" test is inadequate to establish competence to make the weighty decisions at issue in this case, because it fails to take account of a defendant's emotional state as it might undermine his ability to appreciate his peril or weaken his desire to vindicate his own interests. Although the "understand and assist" test does not expressly mandate examination of the "volitional" or "affective" aspects of a defendant's capacity to participate in the trial process, those elements are inherently part of the assessment of a defendant's competence to stand trial. A person who is unable to advance his own interests or act effectively in his own behalf—whether as a result of anxiety, depression, or other mental condition—is incompetent under the traditional *Dusky* test because he is incapable of assisting in his own defense.[9] By the same token, a finding that a defend-

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[9] See, *e.g.*, A. Louis McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 Am. J. Psychiatry 623, 628 (1965) (noting the importance of taking into account the defendant's affect and "degree of volition" in evaluating competence); Robey, *supra*, 122 Am. J. Psychiatry at 618 (checklist for competence includes assessment for "suicidal depression" and "regressive withdrawal" manifested, among other things, by accused's emotional indifference to his fate); Ronald Roesch and Stephen Golding, *Competency to Stand Trial* 59 (1980) (describing competency screening test that takes note of "self-defeating behavior" or mood disorders that "might interfere with participation in the defense"); *id.* at 64 (describing alternative protocol for evaluating competence that is designed to assess "an accused's ability to

ant is competent to stand trial, as was made here, can be taken to establish, at a minimum, that he is capable of rationally assessing and pursuing his own interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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cope with the trial process in an adequately self-protective fashion"); Bennett, *supra*, 53 Geo. Wash. L. Rev. at 378 & n.18 (Harvard Medical School Laboratory of Community Psychiatry's recommended criteria for competence to stand trial includes evaluation of defendant's "self-defeating versus self-serving motivation" as it relates to his desire "to adequately protect himself and appropriately utilize legal safeguards to this end").

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,

Petitioner,

vs.

RICHARD ALLAN MORAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the standard for competency to waive rights different from the standard for competency to stand trial?

2. Is a state court finding of competency to waive rights a finding of fact protected under 28 U. S. C. § 2254(d)?

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IN THE

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OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
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RICHARD ALLAN MORAN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision below did not pay proper deference to state court findings of competence to waive rights. Furthermore, it imposed an unnecessary new standard of competency for waiver. The decision below, if affirmed, would place serious burdens upon waivers of rights in

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1. CJLF has received written consent from both parties to file this brief.

general and guilty pleas in particular. This is contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in the case.

SUMMARY OF FACTS AND CASE

At 4:30 a.m. on August 2, 1984, respondent Moran and a companion entered the Red Pearl Saloon in Las Vegas, Nevada. Without warning, Moran shot the bartender and the bar's one customer. Both victims died. Nine days later, Moran went to the apartment of his ex-wife where he shot her five times, killing her. Pet. App. B 3. After killing his ex-wife, Moran attempted to commit suicide. *Id.*, at 3-4.

Moran was examined by two psychiatrists to see if he was competent to stand trial. Both psychiatrists who examined him found him competent to be tried. *Id.*, at 4. On November 28, 1984, Moran discharged his counsel and entered guilty pleas to all charges. *Ibid.* Before accepting the guilty plea and waiver of counsel, the trial court extensively canvassed Moran. Pet. 6.

On December 17, 1984, Moran appeared before the trial court *in propria persona*. The judge advised him that it was unwise not to have an attorney and asked him if he wanted to reconsider either of his previous decisions. Moran said no. He also informed the judge that he wanted no witnesses subpoenaed, nor any standby counsel appointed, and no investigation of mitigating circumstances for his penalty phase. Pet. App. B 4-6. On January 21, 1985, a three-judge panel conducted the penalty hearing and sentenced Moran to death. *Id.*, at 6. The Nevada Supreme Court affirmed his plea and sentence. See Pet. App. E.

Moran attacked his competency to plead and waive counsel in both state postconviction proceedings and in the federal district court. He was unsuccessful in all of these efforts. See Pet. App. A 9-10. The Ninth Circuit

accepted Moran's argument, however, and granted habeas corpus relief. On the basis of the appellate record, it found that Moran was not competent to plead guilty. *Id.*, at 11. The Ninth Circuit did not defer to the state post-conviction court's finding that Moran was competent because the federal court felt that the state court applied the incorrect legal standard when determining competency. *Id.*, at 18-20.

SUMMARY OF ARGUMENT

A state court finding that a defendant was competent to waive rights is a finding of fact under 28 U. S. C. § 2254(d).

The state court is the best place to make the competency finding because the trial judge is the only judge to observe defendant at the time of waiver. As competency findings are not a precise science, federal courts are at a significant disadvantage when reviewing a competency finding from a cold record, as demonstrated by the present case.

Deferring to state court competency findings under section 2254(d) is consistent with this Court's precedents. They stress that whether a question is factual should be determined by looking to which court is best suited to make the finding, whether the question has historically been treated as factual, and whether deferring to state courts will threaten the underlying right. All of these factors favor protecting state court findings under section 2254(d).

The Ninth Circuit improperly presumed against the validity of Moran's waiver. In federal habeas corpus there is a presumption of correctness that protects final judgments, including waiver of constitutional rights. This overrides the presumption against waiver advocated by the Ninth Circuit.

There is no difference between competency to stand trial and competency to waive rights. Historically, this Court has treated these two issues under the same basic question: whether the defendant understands the nature and consequences of what is happening to him. Whatever differences exist in the exact nature of the two inquiries are minimal given the inexact nature of psychiatry and psychology.

The standard formulated by the Ninth Circuit helps no one while imposing substantial costs. It is derived from a much too broad reading of a *per curiam* decision of this Court. Given the inexact nature of the mental health sciences, the Ninth Circuit's standard will not provide defendants with any additional real protection. What the new standard will do, however, is burden trial courts with unnecessary additional competency hearings.

ARGUMENT

I. The issues addressed in this brief are fairly included in the questions set forth in the petition.

Supreme Court Rule 14.1(a) states that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." The argument *amicus* presents, that the Ninth Circuit should have deferred to the Nevada court's finding that Moran was competent, satisfies this rule.

The question presented in the petition for certiorari is "[w]hether federal courts can require a heightened standard of mental competency when a state criminal defendant (1) enters a plea of guilty, and (2) waives counsel." Pet. i.

Amicus' argument is fairly included within this question. The Ninth Circuit's finding that the Nevada court should have used a higher standard of competence allowed it to ignore the state court's competency finding

and avoid deciding whether it should have deferred to this finding. See Pet. App. A 15-18. Therefore, the deference issue is necessarily intermixed with the standard issue.

The deference issue was also directly raised in the certiorari petition. Part III of the petition argued that the Ninth Circuit's disregard of state court findings was another reason for granting certiorari. Pet. 19-21. While this issue was not explicitly asserted in the questions presented portion of the certiorari petition, this issue certainly was raised by petitioner as a reason to grant the certiorari petition.

Rule 14.1(a) is meant to inform. It serves two important purposes: 1) providing the respondent with notice of issues on which certiorari is granted, and 2) assisting this Court in deciding which cases will be granted certiorari. *Yee* v. *Escondido*, 118 L. Ed. 2d 153, 170-171, 112 S. Ct. 1522, 1523 (1992). As the petition made this Court and respondent aware of objections to the Ninth Circuit's disregard of the state court findings, arguments related to this subject may be addressed in the present case.

II. A state court's finding of competency to plead guilty and waive counsel is a presumptively correct finding of fact.

Two Nevada courts found that Moran was competent to discharge counsel and plead guilty. The trial court made an implicit competency finding when it engaged in a colloquy with defendant and accepted his guilty plea and discharge of counsel. The state postconviction court made an explicit finding of competence in its opinion denying Moran's application for relief. See Pet. App. D 7-8. The Ninth Circuit ignored both of these findings. It found that the trial court should have held a competency hearing before accepting the guilty plea, because it should have had a good faith doubt about Moran's competency to waive his rights. Pet. App. A. 12-13. The Ninth

Circuit chose not to defer to the postconviction court's finding because the federal court believed that the state court applied the wrong legal standard of competency. See *id.*, at 16-17.

These conclusions are wrong. Any finding of competency to waive rights is a finding of fact under 28 U. S. C. § 2254(d). As the Nevada courts applied the correct standard of competency, see part IV, *post*, at 19-24, the Ninth Circuit could not ignore their findings, but instead had to defer to them.

A. The Better Forum.

The question of whether a state court finding is a finding of fact protected under 28 U. S. C. § 2254(d) is a practical one. "[T]he practical truth [is] that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is analysis." *Miller* v. *Fenton*, 474 U. S. 104, 113 (1985). Crucial to this allocation is whether the state court is better suited to make the relevant finding than a federal court. See *id.*, at 114. As state courts are much better positioned to decide if a defendant is competent to waive rights, federal habeas courts should defer to state competency findings under section 2254(d).

State courts are best suited to determine competency because they decide the issue first. This Court has recognized "the difficulty of retrospectively determining an accused's competence to stand trial." *Pate* v. *Robinson*, 383 U. S. 375, 387 (1966). A court reviewing the competence of a defendant in a prior proceeding will have to extrapolate from a cold record. This will disadvantage any experts the reviewing court relies upon, and most importantly, deprive it from personally observing defendant. See *ibid*. The ability to observe a witness gives a trial court a crucial advantage over federal habeas corpus courts in determining the credibility of witnesses. " 'In

doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong?' " *Marshall* v. *Lonberger*, 459 U. S. 422, 434 (1983) (quoting *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952)).

Similar analysis applies to a state court's competency finding. Psychiatry is an inexact science. See *Medina* v. *California*, 120 L. Ed. 2d 353, 367, 112 S. Ct. 2572, 2580 (1992). Psychiatric diagnosis is primarily " 'medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician.' " *Ibid.* (quoting *Addington* v. *Texas*, 441 U. S. 418, 430 (1979)). Thus one psychiatric expert has testified to his doubt that psychiatrists and psychologists are better qualified than lay individuals to determine whether a person was sane at the time a crime was committed. See *People* v. *Jones*, 811 P. 2d 757, 763 (Cal. 1991).

The question of competency is just as uncertain. The best evidence will frequently be the defendant's demeanor. Therefore, observing a person's behavior can "obviate 'the need for extensive reliance on psychiatric prediction concerning [defendant's] capabilities.' " *Drope* v. *Missouri*, 420 U. S. 162, 179 (1975). While an " 'uncontradicted . . . history . . . of pronounced irrational behavior' " may require psychiatric inquiry, see *ibid.* (quoting *Pate*, *supra*, 383 U. S., at 385-386), in most instances, the trial court's observations will be sufficient to support a competency finding. In those rare instances where psychiatric testimony is needed, the psychiatrists testifying before the state court will have the substantial advantage of having observed defendant at the relevant time his competency was in question. See *Pate*, *supra*, 383 U. S., at 387 (psychiatrists disadvantaged when making observations from a cold record).

In the present case, two Nevada courts found Moran competent to discharge counsel and plead guilty. The

postconviction court made a specific finding on this issue. See Pet. App. D 6. The state trial court implicitly made a similar finding when it accepted Moran's discharge of counsel and guilty plea. The trial court's finding provides the strongest demonstration that state courts are the best forum for determining competency.

Unlike any other judge in the present case, the trial judge was able to observe Moran at the time he waived his rights. The record demonstrates that Judge Leavitt was concerned about Moran's ability to make a knowing and intelligent waiver of his rights. The judge engaged in an extensive colloquy with the defendant and attempted to persuade him not to waive counsel. See Pet. 6. He made this decision aided by psychiatrists' reports indicating that Moran was competent to stand trial.

The federal district court recognized these advantages and deferred to Judge Leavitt's decision. One of the most important reasons for this deference was the fact that the trial court personally observed Moran when he made his plea. "Moreover, the record does not reflect that the judge, the prosecutor, or the two attorneys initially appointed to represent Moran felt that his mental faculties were impaired because of the medication he had consumed." Pet. App. B. 13-14.

The Ninth Circuit abandoned any notion that the trial court's decision warranted deference. Substituting its judgment for that of the trial court, it found that the trial court should have held a formal hearing on Moran's competency to discharge counsel and plead guilty. Pet. App. A 15. The Ninth Circuit dismissed the trial court's colloquy with Moran by noting that "[t]he transcript of the plea hearing shows that virtually all of Moran's responses to the court's questions were monosyllabic." *Id.*, at 13-14. The Ninth Circuit attempted to buttress this point by noting that Moran was on prescription medication at the time he made his plea. *Id.*, at 14.

This is precisely the type of cold reading from the record that this Court has condemned. "Title 28 U. S. C. § 2254(d) gives federal habeas courts no license to redetermine the credibility of witnesses *whose demeanor has been observed by the state trial courts but not by them.*" *Lonberger, supra*, 459 U. S., at 434 (emphasis added). The manner in which Moran made his "monosyllabic" responses will be the crucial factor in determining whether these responses demonstrated Moran's competency or incompetency. If Moran were glassy-eyed and made unintelligible, monotone responses to the questions, then his competency would be properly in doubt. If, however, he gave his answers in a normal tone and manner, then the colloquy becomes evidence of his competence. From a cold record a court "cannot now recreate his tone of voice or the gloss that personality puts upon speech." *Von Moltke* v. *Gillies*, 332 U. S. 708, 730 (1948) (Frankfurter, J., concurring). Only the trial judge can make this observation. No federal habeas courts can make this judgment.

This Court overturned a very similar finding of the Ninth Circuit for this same reason in *Demosthenes* v. *Baal*, 495 U. S. 731 (1990). There the Ninth Circuit granted a stay of execution to hold a hearing to determine whether Baal was competent to waive postconviction proceedings. *Id.*, at 734. The federal court granted this stay in spite of a finding by a Nevada postconviction court that Baal was competent to make the waiver. See *id.*, at 732-733. This Court vacated the stay, deferring to the findings of the Nevada court, which unlike the Ninth Circuit had personally observed Baal. "Indeed, because the Court of Appeals did not personally observe Baal, as the state court did, it had even less reason to overturn what is essentially a factual determination." *Id.*, at 737.

The other Nevada court that found Moran competent, the postconviction hearing court, is also more capable of determining competence than a federal habeas court. The court was made up of the three judges who formed

Moran's sentencing panel—Judges Fondi, Breen, and Leavitt. All of these judges had the advantage of having observed Moran at or near the time he made his plea. Judge Leavitt was the trial judge who took his plea and initially found him competent, while Judges Fondi and Breen were able to observe Moran at the penalty phase, which took place less than two months after Moran discharged his counsel and entered his guilty plea. See Pet. App. B 4, 6. This too is an advantage no federal court can enjoy and also warrants respect under section 2254(d).

Section 2254(d) does not only protect trial court findings. It protects all state courts. See *Sumner* v. *Mata*, 449 U. S. 539, 545-546 (1981). This is particularly true when federal habeas courts make their determination based upon the same record as the state court. While nontrial courts are not as well positioned to find competency as trial courts, they are nonetheless better positioned to rule on competency than federal habeas courts.

B. Competence and Precedent.

Holding that competency to waive constitutional rights is a question of fact is consistent with the rest of this Court's section 2254(d) precedent. Perhaps the closest this Court has come to deciding whether competency to waive is a finding of fact under section 2254(d) is in *Maggio* v. *Fulford*, 462 U. S. 111, 116-117 (1983) (*per curiam*). In that case, a state court finding of competency to stand trial was held to be a finding of fact under section 2254(d). It is an insignificant jump from concluding that competency to stand trial is a factual finding to holding that competency to waive is similarly factual. The *Maggio* Court simply asserted that a finding of competency to try warranted protection under section 2254(d). See *id*., at 117. The reasons it gave for holding that the state court's finding was supported by the record demonstrate the similarity between a finding of competency to try and competency to waive. Among the many reasons for

supporting the state court's finding, the *Maggio* Court placed importance upon the trial court's ability to assess the demeanor and credibility of defendant and the witnesses. See *id*., at 117-118. As credibility is similarly crucial to the competency to waive finding, see part II A, *ante*, at 6-10, this finding should also be protected under section 2254(d).

This Court protected another state court competency finding under section 2254(d) in *Demosthenes* v. *Baal*, 495 U. S. 731 (1990) (*per curiam*). Baal had been sentenced to death and wished to forego any postconviction proceedings. *Id*., at 732. A Nevada postconviction court held hearings and determined that he was competent to make the waiver. *Id*., at 732-733. The District Court refused to hold an evidentiary hearing on Baal's competence, but the Ninth Circuit stayed Baal's execution, finding that there was at least a minimal showing of incompetency that required a stay. *Id*., at 734.

This Court, relying upon section 2254(d)'s presumption of correctness, vacated the stay. "We have held that a state court's conclusion regarding a defendant's competency is entitled to" protection under section 2254(d). *Id*., at 735. The *Baal* Court did not distinguish between types of competency findings. It relied upon *Maggio*, a competency to try case, to support protecting a finding of competency to forego habeas. See *ibid*. If there is no difference between competency findings at the beginning and the end of the criminal justice process, then there is no reason to exclude competency to waive from the protection of section 2254(d).

Another case close to the present case is *Marshall* v. *Lonberger*, 459 U. S. 422 (1983). *Lonberger* involved a dispute over validity of a prior guilty plea that was admitted as evidence in defendant's murder trial. There was considerable disagreement between the defense and the prosecution over the historical facts regarding the voluntariness of the prior guilty plea. *Id*., at 426. Before

trial on the current charges, the trial court held a hearing on the voluntariness of the guilty plea. It examined the records surrounding the plea and defendant took the stand and testified about his plea that occurred three years earlier. See *id.*, at 428.

The *Lonberger* Court first divided the factual and legal issues raised by an attack on a guilty plea. The ultimate issue of voluntariness was a question of federal law, not of fact. *Id.*, at 431. But the facts surrounding the plea and the inferences drawn from them were protected by section 2254(d). *Id.*, at 431-432. The Court of Appeals had found that the factual record did not support the conclusion that the plea was intelligent. *Id.*, at 430-431. It recognized that it was disagreeing with the factual findings of a state court, but held that the Ohio court's findings were not " 'fairly supported by the records before them' " thus overcoming section 2254(d)'s presumption of correctness. *Id.*, at 430-431.

This Court did not disagree with the Sixth Circuit's division of factual and legal questions. The Sixth Circuit was reversed because it misapplied the "fairly supported" test to overcome a state court's fact findings. See *id.*, at 432. Although the opinion dealt with when a federal habeas court could disregard state findings of fact, *Lonberger* also demonstrated the great array of findings regarding guilty pleas that are protected under section 2254(d).

> "Thus, the *factual* conclusions which the federal habeas courts were bound to respect in assessing respondent's constitutional claims were the contents of the Illinois court records, the finding of the Ohio trial court that respondent was '*an intelligent individual*, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois,' *supra*, at 428, and the similar conclusion of the Ohio Court of Appeals, and

> the inferences fairly deducible from these facts." *Id.*, at 435 (emphasis added).

If finding that a person was intelligent enough to plead guilty is a question of fact, then competence to plead guilty must be similarly factual. While competence and intelligence are not synonymous, they both address the same basic issue: a defendant's capacity to make a knowing and intelligent waiver of his rights.

The reasoning of *Lonberger* was applied to another case close to the present one in *Parke* v. *Raley*, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992). *Parke* dealt with the validity of a Kentucky procedure placing a shifting burden of production on defendant when attacking the validity of prior convictions in persistent felony offender proceedings. 121 L. Ed. 2d, at 400, 113 S. Ct., at 519. After holding that this procedure was constitutionally permissible, the *Raley* Court had to determine the validity of a prior guilty plea.

This Court reiterated the principle that "although 'the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal constitutional law,' 459 U. S., at 431, questions of historical fact including inferences properly drawn from such facts, are in this context entitled to the presumption of correctness accorded state court factual findings under 28 U. S. C. § 2254(d)." *Raley*, *supra*, 121 L. Ed. 2d, at 407, 113 S. Ct., at 526 (quoting *Lonberger*, *supra*).

As in *Lonberger*, the *Raley* Court found that the factual determinations by the trial court were " 'fairly supported by the record' . . . ." 121 L. Ed. 2d, at 408, 113 S. Ct., at 527. As in *Lonberger*, this holding also demonstrated which findings were factual under section 2254(d).

> "The Kentucky Court of Appeals, reviewing the trial court's decision not to suppress the 1981 conviction, observed that respondent had an eleventh grade education, could read adequately, was represented by

counsel in the 1981 proceedings, *and was in no way mentally impaired when he entered his plea*." *Ibid.* (emphasis added).

If a defendant's lack of mental impairment is factual, then so must be his competence to waive his rights.

In *Miller* v. *Fenton*, 474 U. S. 104 (1985), this Court set out the analysis used to find out whether an issue was factual under section 2254(d). The most important principle, allocating the issue to the most capable court, see *id.*, at 114, strongly favors the state court. See part II A, *ante*, at 6-10. The other factors listed in *Miller* also support protecting the state courts.

In holding that voluntariness of a confession was not a question of fact, *Miller* emphasized the past treatment of this issue. Since this Court previously held that the question of voluntariness was a legal inquiry, the *Miller* Court felt bound by precedent. See *id.*, at 115. Competency to waive rights does not carry this historical baggage. The cases closest to deciding the status of a competency finding, *Lonberger*, *Maggio*, *Baal*, and *Raley*, support the protection of state competency findings.

The *Miller* Court also looked to the importance of credibility and demeanor. Where these factors are important to the resolution of the ultimate issue in question, then the state court finding is much more likely to be factual. See *id.*, at 116-117. Credibility and demeanor are essential to any finding on competency. See part II A, *ante*, at 8-10.

Another reason given by the *Miller* Court for finding voluntariness a mixed question of fact and law was that most confessions occur in a relatively secret environment. The guilty plea in *Lonberger*, the competency to stand trial determination in *Maggio*, and the determination of juror bias in *Wainwright* v. *Witt*, 469 U. S. 412 (1985) all "[took] place in open court on a full record." *Miller*, *supra*, 474 U. S., at 117. The secrecy frequently surrounding confessions increased the risk the federal right may be inadvertently frustrated by deferring to state courts. *Id.*, at 117. As the events surrounding the competency to plead finding take place in open court, the present case does not involve this risk of error.

The competency finding raised by the present case has all the features that warrant protection under section 2254(d) and none of the features that would make it a mixed question of fact and law. State courts are by far the best forums for resolving this issue, and federal habeas courts have significant disadvantages when reviewing these state court findings. Yet the Ninth Circuit paid little heed to these considerations when it vacated the state courts' findings.

III. The Ninth Circuit improperly burdened state findings of waiver.

The Ninth Circuit tipped its hand early. Near the beginning of the opinion it made the following observation about Moran's discharge of counsel and guilty plea. "Because such an extensive waiver of constitutional rights demands 'utmost solicitude' from courts, the court is required to indulge in every reasonable presumption against waiver of constitutional rights." Pet. App. A 4. This statement demonstrates the fundamental problem with the Ninth Circuit's analysis. While the sentiment quoted above may be proper for a court exercising direct review, see *Brady* v. *United States*, 397 U. S. 742, 748 (1970), it has no place in a federal habeas case.

The Ninth Circuit's presumption against the validity of Moran's waivers "improperly ignore[s] another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, *even when the question is waiver of constitutional rights*." *Parke* v. *Raley*, 121 L. Ed. 2d 391, 404, 113 S. Ct. 517, 523 (1992) (emphasis added). The Ninth Circuit's failure to apply

this longstanding principle compromises its subsequent analysis of Moran's case.

Raley involved a burden shifting scheme regarding the validity of prior convictions. If the state proved the fact of a conviction beyond a reasonable doubt, then a presumption of regularity attached, shifting the burden to the defendant to produce evidence that his conviction was irregular. If such evidence was produced, then the burden shifted back to the state to show that the judgment was entered in a manner that protected defendant's rights. 121 L. Ed. 2d, at 400, 113 S. Ct., at 520.

On federal habeas corpus, the Sixth Circuit found that this scheme was unconstitutional when applied to prior guilty pleas. The Sixth Circuit thought it was compelled to reach this decision because of the statement in *Boykin* v. *Alabama*, 395 U. S. 238, 244 (1969) that the validity of the waiver accompanying a guilty plea cannot be presumed from silence. *Raley*, *supra*, 121 L. Ed. 2d, at 403, 113 S. Ct., at 523.

This Court distinguished *Boykin* because it involved direct review instead of habeas corpus. *Ibid*. As *Raley* was a habeas case, the presumption of regularity placed the case out of the reach of *Boykin*. 121 L. Ed. 2d, at 404, 113 S. Ct., at 523. A presumption of regularity that protects the ultimate validity of a guilty plea must also protect a finding of competency to waive rights. The finding of competency and the subsequent waiver, like the pleas in *Raley*, "became final years ago, and [Moran] now seeks to revisit the question of their validity . . . ." 121 L. Ed. 2d, at 403-404, 113 S. Ct., at 523.

As in *Raley*, the judgment Moran seeks to overturn has its own validity that creates a presumption of regularity. As Justice Black noted in the case that established the standard for waiver of rights:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus, the burden of proof rests upon him* to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.
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> * * *
>
> "*If petitioner fails to sustain his burden, he is not entitled to the writ.*" *Johnson* v. *Zerbst*, 304 U. S. 458, 468-469 (1938) (emphasis added) (footnotes omitted).

In addition to ignoring precedent, the Ninth Circuit's approach also unfairly burdens state criminal justice systems. The Ninth Circuit used its presumption to support a finding that the trial court should have held a hearing to determine Moran's competency to waive his rights. Pet. App. A 4-5. Mandating such a hearing on the basis of an improper presumption unduly burdens a vital part of the state criminal process and will inevitably create needless friction between state and federal courts.

Guilty pleas serve several important purposes. As part of the plea bargaining process, the guilty plea is an integral part of one of the most important procedures in the criminal justice system. The plea bargain "is an essential component of the administration of justice." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). If all criminal charges went to trial, the criminal justice system would be overwhelmed, requiring many more courts. *Ibid*. If a person's competency to plead guilty can be attacked as easily as it has been in the present case, then prosecutors may be less willing to accept plea bargains. The resulting increased workload for prosecutors, defense counsel, and the courts should be avoided whenever possible.

The guilty plea is more than an administrative convenience.

"For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family." *Brady* v. *United States*, 397 U. S. 742, 750 (1970).

A guilty plea will also help the victims and their families. The quick resolution of the perpetrator's guilt will save them the trauma of the trial and the delays associated with the criminal justice system. This will both aid and speed the healing process for the victims.

A guilty plea should not be taken lightly. Therefore, it must be made knowingly and intelligently, and the record must show that these conditions were satisfied. See *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969). These requirements recognize the gravity of the guilty plea and protect it from abuse. There is no further need to protect those who plead guilty by taking every reasonable presumption against the validity of the defendant's act.

IV. The competence needed for waiver is the same as competence to stand trial.

The Ninth Circuit avoided paying deference to the fact findings of the Nevada courts by asserting that they used an improper standard for determining competency to waive constitutional rights. The Ninth Circuit held that the standard of competency enunciated in *Dusky* v. *United States*, 362 U. S. 402 (1960) was not sufficient to allow a waiver of rights. Instead, a person may waive counsel or plead guilty only if that person "has the capacity for 'reasoned choice' among the alternatives available to him." Pet. App. A 19. This new standard will provide

little further real protection for defendants, while adding another level of complexity to the criminal justice system. As neither the Constitution nor common sense requires it, the Ninth Circuit's standard should be rejected. Adopting the *Dusky* standard will protect the defendant's rights without further complicating our criminal procedure.

A. The Competence Standard.

The tradition of protecting incompetent defendants extends back to the common law. The common law prohibited the trial of incompetents because they could not make their defense. 4 W. Blackstone, *Commentaries* 24 (1769). Similarly, someone who became "mad" before arraignment could not be arraigned for a capital offense "because he is not able to plead it with that advice and caution that he ought." *Ibid*. There was no distinction between competency to stand trial and competency to plead. A person simply was or was not "mad."

Like the common law, this Court has not announced different standards of competency for these two parts of criminal procedure. In *Dusky* v. *United States*, 362 U. S. 402 (1960) (*per curiam*), this Court established the proper inquiry into a defendant's competency to stand trial: "whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of factual understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id*., at 402.

This Court has been more circumspect regarding competency to waive rights. While it has established general parameters for competency to waive rights, it has never announced a formal test in the way it did in *Dusky*. While no formal test has emerged, this Court has required an essentially similar level of competency for waiver.

An early hint of what was needed for waiver came in *Patton* v. *United States*, 281 U. S. 276 (1930). The *Patton*

Court decided the previously unanswered question of whether a defendant could waive his right to a 12-person jury. See *id.*, at 287. The *Patton* Court engaged in an extensive discussion on the propriety of allowing waiver of constitutional rights. Quoting from a leading state case favoring waiver, the *Patton* Court noted " '[a] plea of guilty to any indictment, whatever may be the grade of crime, will be received and acted upon if it is clear that the nature and effect of it are understood by the accused.' " *Id.*, at 303. If a person cannot understand the nature and effect of his waiver, then he would not be competent to make it. Thus *Patton* both implies and sets a standard of competency for waiver.

This Court again briefly referred to competency and waiver in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). *Johnson* established the knowing and intelligent requirement for waiver. See *id.*, at 464. The *Johnson* Court also understood that a necessary subset of this standard was that the defendant had to be competent to make this waiver. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Id.*, at 465. Justice Black gave no further detail. A waiver simply was or was not made competently. The only clue as to what is competent is that Justice Black substituted competent for knowing. While no reason is given for this, the fact of the substitution is evidence of the similarity between the two requirements. This is also consistent with the *dicta* in *Patton* on the need for defendant to understand the nature and consequences of his guilty plea.

In *Carter* v. *Illinois*, 329 U. S. 173 (1946), this Court addressed the issue of whether someone could plead guilty without the advice of counsel. Upholding the waiver made by the defendant, the Court noted that "[f]acts bearing on his maturity or *capacity of comprehension* . . . are wholly wanting." *Id.*, at 178 (emphasis

added). It also recognized that a person can plead guilty so long as he is "fully advised of all its implications and *capable of understanding them*." *Id.*, at 174 (emphasis added). If a defendant satisfies these two requirements then it is not necessary to force counsel upon him before pleading guilty. *Id.*, at 174-175. Once again, competence is equated with understanding.

The focus on whether the defendant understands the consequences of his waiver continues today. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U. S. 742, 748 (1970). What is necessary is to insure that a defendant "does not plead guilty except with a full understanding of the charges against him and possible consequences of the plea . . . ." *Id.*, at 748, n. 6. This is the heart of the competency necessary to waive a constitutional right. If the defendant can understand the nature and consequences of the waiver, he is competent to waive. If he is then informed of the nature and consequences of the waiver, any waiver will be knowing and intelligent.

> "The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties; . . . ." *Id.*, at 756.

The *Brady* Court did not expand upon why the defendant was competent because it did not need to. As he could understand the nature and consequences of his waiver, he was competent to make the waiver.

This is equivalent to the standard for competence to stand trial: "whether [the defendant] has a rational as well as factual *understanding* of the proceedings against him." *Dusky*, *supra*, 362 U. S., at 402 (emphasis added).

The wording varies, but the inquiry is the same: can the defendant understand what is happening to him?

Because waiver and trial are different parts of criminal procedure, the necessary questions are somewhat different. Competency to stand trial looks to defendant's understanding to help him consult with counsel, see *Dusky*, *supra*, 362 U. S., at 402, while the waiver question looks to understanding to inform the defendant of the consequences of his waiver. But the ultimate question is the same: does the defendant understand what is happening? Psychiatry and psychology are inexact sciences. See *Medina* v. *California*, 120 L. Ed. 2d 353, 367, 112 S. Ct. 2572, 2580 (1992). The subtle distinctions between these questions are irrelevant for such an inexact science.

Nevada was not alone when it equated competency to waive with competency to stand trial. In the federal system the standard for competency to stand trial is whether a defendant is "unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U. S. C. § 4241(a). In addition to being the equivalent of the constitutional standard for pleading guilty announced in *Brady*, *supra*, it is also equivalent to the standard for guilty pleas found in the Federal Rules of Criminal Procedure. Before accepting a guilty plea, a federal court must "determine that the defendant understands" the nature of his charge, and the rights he will give up by pleading guilty. Fed. R. Crim. P. 11(c). This is the same as insuring that the defendant understands the nature and consequences of his plea. Most federal circuit courts recognize that the rule 11 competency standard is the same as the *Dusky* standard. See part IV B, *post*, at 29. The existence of similar federal criminal procedure is strong support for the constitutionality of a state's procedure. See *Parke* v. *Raley*, 121 L. Ed. 2d 391, 406, 113 S. Ct. 517, 525 (1992).

Equating competency to stand trial and competency to waive does not mean that all questions of mental health

are the same. This Court has repeatedly recognized the futility of treating all competency questions the same. See *Medina* v. *California*, 120 L. Ed. 2d 353, 365, 112 S. Ct. 2572, 2579 (1992); see also *Drope* v. *Missouri*, 420 U. S. 162, 176-177 (1973); *Jackson* v. *Indiana*, 406 U. S. 715, 739 (1972).

These cases do not prevent equating competency to try with competency to waive. They deal with attempts to equate the standard for a not guilty by reason of insanity plea with competence to be tried. See, *e.g.*, *Medina*, *supra*, 120 L. Ed. 2d, at 365, 112 S. Ct., at 2579; *Drope*, *supra*, 420 U. S., at 176-177; *Jackson*, *supra*, 406 U. S., at 739. Competency and insanity are two different issues. They involve different inquiries and different levels of constitutional involvement. See *Medina*, *supra*, 120 L. Ed. 2d, at 365, 112 S. Ct., at 2579. This difference is much greater than the difference between two shades of the same question.

Equating the competency to try and competency to waive will also simplify our criminal procedure. A multiplicity of tests, each having their own subtle variations, can only lead to confusion and unnecessary error. Equating the two standards would have the added benefit of keeping in line with the traditional practice in this country of treating competency to stand trial "as the standard for all purposes of the criminal proceedings." See *Competence to Plead Guilty: A New Standard*, 1974 Duke L.J. 149, 155.

The trial is the " 'main event' " of our criminal justice system. See *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). Therefore, competency to try is a very grave issue. The trial involves numerous decisions that, while not as important as the decision to plead guilty, are at least as complex:

> "[H]e [the defendant] must decide, with the assistance of his counsel, such things as whether to plead insanity, temporary insanity, alibi, or some other affirmative

defense, and whether to take the stand. Furthermore, the defendant at trial faces more than decisions. For example, the demands of testifying and the rigors of submitting to cross examination both heavily tax the abilities of a marginally competent defendant." 1974 Duke L.J., at 169 (footnotes omitted).

Thus a finding that the defendant is competent to stand trial deserves respect. This very important issue is essentially the same as competency to waive and should be treated as such. There is no reason to divide the question of competency.

Due process is not a detailed code of criminal procedure. See *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). It is meant to protect defendants from fundamental injustice. See *Patterson* v. *New York*, 432 U. S. 197, 201-202 (1977). There is nothing fundamentally unjust about keeping one standard of competence.

B. Improper Standard.

The Ninth Circuit, betraying its distaste for waiver, established a different standard of competency to waive constitutional rights. Departing from this Court's traditional focus on whether defendant understands the nature and consequence of his waiver, see part IV A, *ante*, at 18-24, the Ninth Circuit will reject any waiver of counsel or guilty plea unless defendant "has the capacity for 'reasoned choice' among the alternatives available to him." Pet. App. A 19. The standard imposed by the Ninth Circuit on Nevada will give little extra protection to defendants while creating needless extra procedures that will inevitably burden waivers of rights.

The origin of the Ninth Circuit's standard is found in *Sieling* v. *Eyman*, 478 F. 2d 211 (CA9 1973). In *Sieling*, defendant had been found competent to stand trial, but a month after this finding decided to plead guilty. *Id.*, at 213. While the trial court briefly inquired into the defendant's understanding of the charge and consequences

of the plea, no further psychiatric examination was made. See *ibid*. Sieling attacked his conviction on federal habeas corpus on the ground that the trial court had never found him competent to plead guilty. He asserted that the finding of competency to be tried did not support competency to plead guilty. *Ibid*.

The Ninth Circuit accepted Sieling's argument. It found support for it in *Westbrook* v. *Arizona*, 384 U. S. 150 (1966). The *Sieling* Court held that *Westbrook* recognized "a distinction between a defendant's mental competency to stand trial, and his competency to waive his right to counsel at trial." 478 F. 2d, at 213. According to the Ninth Circuit, this was derived from the *Westbrook* Court's holding that the trial court's finding that the defendant was competent to assist counsel in his defense was not enough to prove that Westbrook was competent to waive his right to counsel. *Ibid*.

The *Sieling* Court felt that it was necessary to look further before finding competency to waive. Waiver, particularly when a guilty plea was involved, was a serious matter that required careful attention by the courts. See *id*., at 213-214. A competency to try hearing did not go far enough because it did not address the separate issue of competence to waive. *Id*., at 214. Therefore, further inquiry was necessary.

The Ninth Circuit relied upon *Westbrook* to require further scrutiny and a higher standard of competence. As the *Westbrook* Court had required a further inquiry into the defendant's competence to waive counsel after a finding of competence to try, "the trial court must look further than the usual 'objective' criteria in determining the adequacy of a constitutional waiver." *Ibid*. While the *Westbrook* Court did not enunciate a new standard, "it is reasonable to conclude from the Court's language that the degree of competency required to waive a constitutional right is that degree which enables him to make decisions of very serious import." *Id*., at 214-215. The *Sieling* court

then created its new standard, the "reasoned choice" standard used by the Ninth Circuit in the present case. This standard was not derived from any decision of this Court, but instead was taken from a dissent in an earlier Ninth Circuit case, *Schoeller* v. *Dunbar*, 423 F. 2d 1183, 1194 (1970) (Hufstedler, J., dissenting). 478 F. 2d, at 215.

The Ninth Circuit's holding in the present case that Nevada applied the wrong standard of competency rests entirely upon *Sieling*'s interpretation of *Westbrook*. The court below cited only its own cases in support of imposing the higher standard on Nevada. See Pet. App. A 19. These cases are part of a long string of Ninth Circuit authority that runs back to *Sieling*. *Sieling* is the only case in this line that relies on a Supreme Court decision to impose the reasoned choice standard. See *Harding* v. *Lewis*, 834 F. 2d 853, 856 (CA9 1987); *Chavez* v. *United States*, 656 F. 2d 512, 518 (CA9 1981); *Sailer* v. *Gunn*, 548 F. 2d 271, 275 (CA9 1977); *United States* v. *Moore*, 599 F. 2d 310, 313 (CA9 1979); *Sieling*, *supra*, 478 F. 2d, at 214-215.

Westbrook v. *Arizona*, *supra*, is too weak to support *Sieling*'s holding. *Westbrook* is a *per curiam* opinion remanding a case back to the Arizona Supreme Court for re-examination in light of *Pate* v. *Robinson*, 383 U. S. 375 (1966). 384 U. S., at 151. The only facts stated by the *Westbrook* Court are that "[a]lthough petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed as he did, to conduct his own defense." *Id*., at 150. The Court next quoted from *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938) on the importance of ensuring that waiver of counsel was intelligent and competent. 384 U. S., at 150. The *Westbrook* Court then concluded its analysis with a one-sentence holding. "From an independent examination of the record, we conclude that the question whether this

'protecting' duty was fulfilled should be re-examined in light of our decision this Term in *Pate* v. *Robinson*, 383 U. S. 375." 384 U. S., at 151.

Pate v. *Robinson* did not create any new or higher standard of incompetency. *Robinson* dealt with when a defendant had to be given a hearing on his competency to stand trial. *Robinson*, *supra*, 383 U. S., at 377. Robinson had a long history of severe mental illness. See *id*., at 378-381. In spite of this, the trial court made no effort to hold a competency hearing. The prosecution attempted to justify this by asserting that Robinson waived his right to a competency hearing by failing to ask for one. This Court dismissed this defense, holding that an incompetent person cannot waive a right to a competency hearing. *Id*., at 384. The state's failure to hold a competency hearing *sua sponte* in light of Robinson's history of irrational behavior violated due process. *Id*., at 385.

If it meant to create a new standard, the *Westbrook* Court would have announced it. Remanding a case back to a state court because it applied an improper standard of competency without telling the lower court the proper standard to apply would have been illogical and unfair. When a lower court applies the wrong standard, this Court will tell the lower court what the proper standard is. See, *e.g.*, *Dusky* v. *United States*, 362 U. S. 402 (1960) (announcing proper standard for competency to try when trial court used an improper standard).

What is more likely is that the *Westbrook* Court was dissatisfied with the factual findings of the trial court. This would explain its reference to an independent examination of the record and the remand in light of *Robinson*. If some serious incident demonstrating incompetence occurred between the competency hearing and Westbrook's decision to represent himself, then the trial court should have held another competency hearing.

The *Sieling* Court read too much from a very brief, cryptic opinion. *Westbrook* is a *per curiam* decision that

announced no new standard, and has not been cited in any subsequent decision of this Court. The Ninth Circuit should not be allowed to read so much into this short opinion.

Whatever its value, *Westbrook* does not apply to the present case. In *Westbrook* there was apparently neither a hearing nor an inquiry into the defendant's competence to represent himself. 384 U. S., at 150. In the present case, there was an inquiry into Moran's competence to waive. The trial court engaged in an extensive canvass with Moran before accepting his waiver, see Pet. 6., and Moran had his competence to waive reviewed in his state postconviction hearing. See Pet. App. D 7-8.

The best way to approach *Westbrook* is to limit it to its facts. Where a defendant's competence is already suspect and not even an inquiry is made on his competence to represent himself, then he has been deprived of due process. It should not, however, be allowed to alter the law of competency as the Ninth Circuit would have it.

The Ninth Circuit should not be able to force this view on a state judiciary. Due process

> "has never been perverted so as to force upon the [fifty] States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual states. . . . It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946).

Adopting the *Dusky* standard for competence to waive rights does not offend those ultimate dignities assured by the Constitution. The *Dusky* standard protects the right not to be tried while incompetent, a right as old as the common law. See *Medina* v. *California*, 120 L. Ed. 2d 353, 364, 112 S. Ct. 2572, 2577 (1992). It has also been

adopted by a substantial majority of the other federal circuits as the standard of competency to plead guilty. See *Allard* v. *Helgemoe*, 572 F. 2d 1, 3-4 (CA1 1978); *Malinauskas* v. *United States*, 505 F. 2d 649, 654 (CA5 1974); *United States* v. *Harlan*, 480 F. 2d 515, 517 (CA6 1973); *United States ex rel. McGough* v. *Hewitt*, 528 F. 2d 339, 342, n. 2 (CA3 1976); *United States* v. *Simmons*, 961 F. 2d 183, 187 (CA11 1992); *Wolff* v. *United States*, 430 F. 2d 443, 444 (CA10 1970); *Butler* v. *United States*, 384 F. 2d 522, 523-524 (CA8 1967). *United States* v. *Collins*, 949 F. 2d 921, 927 (CA7 1991). Only the D.C. Circuit has joined the Ninth Circuit in rejecting *Dusky* as the test for competency to plead guilty. See *United States* v. *Masthers*, 539 F. 2d 721, 726, n. 30 (CA D.C. 1976) (en banc).

In addition to being unpopular, the Ninth Circuit's test is also unnecessary. Given the inexact nature of psychiatry, see *Medina*, *supra*, 120 L. Ed. 2d, at 367, 112 S. Ct., at 2580, there is no reason to have two different tests for two issues that are so similar. There may be difference between a "capacity for 'reasoned choice' among the alternatives available to him," Pet. App. A 19, and a rational and factual understanding of the proceedings, *Dusky*, *supra*, 362 U. S., at 402, but the difference is minimal. It is unreasonable to expect the mental health sciences to make such a fine distinction.

While the difference between the two standards may be minimal, the impact of having more than one standard of competency will be significant. When a defendant is examined for competency to stand trial, he will not be examined for his competency to plead guilty because at this stage of the proceedings most defendants have not yet decided whether to plead guilty. See, *e.g.*, Pet. App. A 20-21. Therefore, under the Ninth Circuit's new standard a second competency hearing would have to be held if defendant chose to waive a right.

Given the minimal effective difference between the two standards, it is unlikely that a new hearing would afford defendants any real protection. The Constitution is meant to protect our fundamental rights, not to promote needless ritual. The Ninth Circuit's standard does no more than add further burden to a legal system already sagging under the weight of procedure.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

January, 1993

Respectfully submitted,

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No. 92-725

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,
Petitioner,

v.

RICHARD ALLAN MORAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES, THE JOSEPH P. KENNEDY, JR. FOUNDATION, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, and THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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ABA Criminal Justice Mental Health Standards, Standard 7-5.8 (1989) 7

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ABA Criminal Justice Mental Health Standards, Standard 7-5.9(a) (1989) 7
ABA, *Standards for Criminal Justice*, Standard 14-1.4(b) (2d ed. 1980) 23

MISCELLANEOUS AUTHORITIES:

Allen et al., *Mental Impairment and Legal Incompetency* (1968) 13
American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 13, 22
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987) 21
Appelbaum & Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 25 New England J. Med. 1635 (1988) 18
Appelbaum & Roth, *Competency to Consent to Research: A Psychiatric Overview*, 39 Archives Gen. Psychiatry 951 (1982) 19
Blackstone, *Commentaries* (1769) 5, 6
Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. Crim. L. & Criminology 419 (1990) 24
Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behavioral Sciences & L. 291 (1992) 5, 8, 11, 13, 14
Brakel et al., *The Mentally Disabled and the Law* (3d ed. 1985) 12, 13
The Criminal Justice System and Mental Retardation: Defendants and Victims (Conley et al. eds., 1992) 22
DeVellis, *Learned Helplessness in Institutions*, 15 Mental Retardation 10 (Oct. 1977) 22
Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985) 7, 16, 22, 23

TABLE OF AUTHORITIES—Continued

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Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 (Crim. Justice & Behavior 147 (1990)	18
Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (1985)	6
Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (1986)	19
Hale, *Pleas of the Crown* (1736)	6
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Lindsey & Luckasson, *Consent Screening Interview for Community Residential Placement: Report on the Initial Pilot Study Data*, 29 Mental Retardation 119 (1991)	19
McClennen, *Cognitive Skills for Community Living: Teaching Students with Moderate to Severe Disabilities* (1991)	23
Melton et al., *Psychological Evaluations for the Courts* (1987)	18
Miller & Germain, *The Specificity of Evaluations of Competency to Proceed*, 14 J. Psychiatry & L. 333 (1986)	19
President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1 *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* (1982)	19
President's Committee on Mental Retardation, *Report to the President: Citizens with Mental Retardation and the Criminal Justice System* (1991)	23
President's Panel on Mental Retardation, *Report of the Task Force on Law* (1963)	23
Sigelman et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 Mental Retardation 53 (1981)	22

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Tepper & Elwork, *Competence to Consent to Treatment As a Psycholegal Construct*, 8 L. & Human Behavior 205 (1984)	18
Weihofen, *Mental Disorder as a Criminal Defense* (1954)	5

IN THE

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OCTOBER TERM, 1992

No. 92-725

SALVADOR GODINEZ, Warden,
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v.

RICHARD ALLAN MORAN,
Respondent.

**On Writ of Certiorari to the
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BRIEF OF
THE AMERICAN PSYCHIATRIC ASSOCIATION,
THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,
THE AMERICAN ASSOCIATION ON MENTAL RETARDATION,
THE ARC,
THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS,
THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES,
THE JOSEPH P. KENNEDY, JR. FOUNDATION,
THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, and
THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici curiae include national professional, voluntary, and advocacy associations concerned with people with mental disabilities. *Amici* thus have knowledge and expertise in the evaluation of people with mental illness and mental retardation and their treatment within the criminal justice system.[1]

THE AMERICAN PSYCHIATRIC ASSOCIATION (APA), founded in 1844, is the nation's largest organization of psychiatric physicians, with approximately 40,000 members. The Association has participated as *amicus curiae* in numerous cases involving psychiatric issues.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary organization of psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of mental disabilities.

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation.

THE ARC (formerly the Association for Retarded Citizens of the United States) is the nation's oldest and largest association of families, professionals and individuals with disabilities devoted solely to promoting the interests of citizens with mental retardation and their families. Since its founding in 1950, The Arc has participated actively in the formulation of public policy with respect to the rights of, and services for, citizens with mental retardation.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000

[1] Petitioner and Respondent in this case have consented to the filing of this brief.

teachers, parents, physicians and other professionals dedicated to developing educational and habilitative services for persons with severe disabilities and protecting the civil rights of those individuals.

THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES represents approximately 650 agencies in 49 states and the District of Columbia that together provide residential services and community support to more than 40,000 people with mental retardation and other developmental disabilities. Members offer a full range of services in a variety of settings designed to enhance the development and independence of those served.

THE JOSEPH P. KENNEDY, JR. FOUNDATION, established in 1946, has as its objectives the prevention of mental retardation and the improvement of the way in which society deals with persons who have mental retardation.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS (NAPAS) represents Protection and Advocacy systems in 50 states and six territories, created pursuant to 42 U.S.C. § 6000 *et seq.* These agencies have the statutory mandate to advocate for the rights of persons with mental disabilities.

THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY (NARPA) is the only national organization which addresses both mental health and retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and retardation services. NARPA was formed in 1979 as a result of coordinating efforts of the National Institute of Mental Health. Among NARPA's hundreds of members are people who design, live, and work in community and institutional services for people with mental retardation.

SUMMARY OF ARGUMENT

The criminal justice system today relies on pleas of guilty for the adjudication of large numbers of cases, and the bargaining process that produces these pleas provides a useful economy for judicial, prosecutorial, and defense resources. But the courts' historical skepticism expressed toward guilty pleas resonates in modern constitutional concerns about those pleas made by defendants with mental disabilities.

It is well settled that guilty pleas result in such important constitutional waivers that the relinquishment of these rights must be made both voluntarily and with understanding of what is being surrendered. Evidence that an individual has a substantial mental disability requires a careful evaluation of what that defendant can do and understand. An inquiry focused solely on whether the defendant has the skills required to stand trial does not provide the trial judge with the specific information needed to determine whether the defendant can competently plead guilty. The due process concerns about such a potentially incompetent waiver are magnified when the defendant also attempts to waive the right to counsel and proceed to adjudication without representation.

Before a defendant with mental illness or mental retardation can waive counsel and plead guilty, the trial court must have adequate assurance that the plea is knowing and intelligent. That assurance can only come with evaluations from mental disability professionals *who have been asked to address the appropriate, legally relevant question.* Anything less impeaches the fundamental fairness of the criminal process.

ARGUMENT

I. INCOMPETENT WAIVERS OF A MENTALLY DISABLED DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND TO A TRIAL IMPEACH THE FUNDAMENTAL FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM.

It has long been recognized that purported guilty pleas by defendants who may be mentally incompetent raise concerns of the utmost gravity. 4 Blackstone, *Commentaries* *24 (1769) (a "mad" defendant "is not able to plead to [the charge] with that advice and caution that he ought."); Weihofen, *Mental Disorder as a Criminal Defense* 454 (1954) ("A plea of guilty, to be valid, must be intelligently made."). Much of this concern derives from the unparalleled magnitude of the waiver. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Acceptance of incompetent pleas contains the potential for unjust convictions which would produce unfairness to defendants and erode public trust in the courts.[2]

Two reasons for "indulg[ing] every reasonable presumption against" the potentially incompetent waivers embedded in a guilty plea, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), are the possibility that the plea is unsupported by an adequate factual basis and the fundamental unfairness of holding a defendant to a "bargain" to which he did not competently agree.[3]

---

[2] One respected commentator has observed that acceptance of such a plea would constitute "a ceremonial farce." Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behavioral Sciences & L. 291, 311 n. 88 (1992).

[3] This Court has indicated that in the context of criminal procedures the test for due process is whether a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. Cali-*

The concern about the factual basis for the plea is particularly justified for defendants who have a sub-

fornia, 112 S. Ct. 2572, 2577 (1992) (citations omitted). It is widely accepted that the prohibition on accepting a plea from an incompetent defendant is of long standing. But it is equally clear that the *reason* for the rule, that the defendant must understand what the plea arrangement involves, has been consistent through history as well. *See, e.g.*, Hale, *Pleas of the Crown* 34 (1736) ("because he cannot advisedly plead to the indictment"); 4 Blackstone, *Commentaries* *24 ("because he is not able to plead to it with that advice and caution that he ought"). *See also* Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 132 (1985) ("In all felony cases the court was supposed to ensure that defendants were fully aware of the implications of a guilty plea"). This same rationale is reflected in the American cases. *See, e.g., Commonwealth v. Battis*, 1 Mass. 95 (1804) (guilty plea would not be accepted until defendant was given time to reconsider); *Hallinger v. Davis*, 146 U.S. 314, 324 (1892) (trial "court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force, and effect of his plea of guilty."); *Pope v. State*, 47 So. 487, 488 (Fla. 1908) ("The plea should be entirely voluntary by one competent to know the consequences"); *State v. Hill*, 95 S.E. 21 (W.Va. 1918) ("[I]t was ancient law and is also settled by modern decisions, and in some states by statute, that a court should never in cases of capital crimes accept a plea of guilty without exercising caution and being satisfied by evidence that the confession is made by the accused freely and deliberately, and with full and perfect knowledge of the nature and consequences of the confession; otherwise the plea should not be received."). By contrast, when the courts addressed the issue of competence *to stand trial*, they employed terms that focused on trial skills and that are remarkably similar to *Dusky*. *See, e.g., R. v. Pritchard*, 7 Carr. & P. 303, 173 Eng. Rep. 135 (N.P. 1836) (whether the accused was "of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any [juror] to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."). Thus, rather than conclude that our legal tradition prohibited guilty pleas from defendants who were vaguely labeled "mad" or "incompetent," it would be more accurate to say that pleas were prohibited unless the defendant was competent to understand the nature and consequences of the plea.

stantial mental illness or mental retardation. Barring impermissible coercion, few nondisabled defendants are likely to agree that they committed an act which they did not do. But inculpatory statements by defendants who have a substantial mental disability "may be of questionable reliability." *ABA Criminal Justice Mental Health Standards*, Standard 7-5.8 (1989) (Commentary at 308). For example, a defendant with mental illness may admit to acts he did not commit because of delusional beliefs, and a defendant with mental retardation may make such an admission because of a factual misunderstanding or a predisposition to acquiescence. *See id.* at 309; Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 431-32 (1985).

Incompetent guilty pleas are also constitutionally forbidden because of the fundamental unfairness of holding a defendant to the terms of a deal to which he did not meaningfully assent. It is for this reason that it is now universally required that before accepting a guilty plea, a trial court must engage in a colloquy to ascertain whether the defendant understands the rights he is relinquishing.[4] *See, e.g.*, Fed. R. Crim. P. 11(c). To accept such an unknowing waiver would violate due process even if the statement were factually reliable. And just as mental disability may raise doubt about the reliability of a statement, it may also negate the understanding necessary for a constitutional waiver. *See ABA Criminal*

[4] If, as Petitioner suggests, a finding that a defendant is competent to stand trial were conclusive evidence that an individual is capable of understanding and waiving constitutional rights, it is unclear why the trial court should ask the "superfluous" questions about the defendant's understanding of what he is waiving. And what if the trial judge is persuaded after the colloquy that the defendant cannot understand the waivers; does this mean that defendant *automatically* fails the *Dusky* test and thus cannot be tried?

Justice Mental Health Standards, Standard 7-5.9(a) (1989).

Waivers of the right to counsel by mentally disabled defendants raise even more serious due process concerns. Although defendants have a right to represent themselves, this Court has recognized that they may exercise that right only if the waiver of the right to counsel is "knowingly and intelligently" made. *Faretta v. California*, 422 U.S. 806, 835 (1975). If a defendant is not competent to waive the right to a lawyer and thus proceed *pro se*, the state may try him with counsel so long as he is not also incompetent to stand trial. *See, e.g., Blackmon v. Armontrout*, 875 F.2d 164, 166 (8th Cir.), *cert. denied*, 493 U.S. 939 (1989); Bonnie, 10 Behavioral Sciences & L. at 299 ("A defendant who is competent to proceed to adjudication *with* counsel may not be allowed to proceed to adjudication *without* representation." (emphasis in original)). Were this not the rule, a defendant could avoid prosecution and punishment completely merely by raising an unsuccessful *Faretta* claim.

All of the concerns about defendants of questionable mental competence who purport to waive their trial rights and plead guilty, as well as the concerns about mentally disabled defendants who state a preference to proceed without representation, are magnified in cases, like the one at bar, where both occur. A plea of guilty is less likely to be unreliable or incompetently made when a defendant is represented by competent counsel. Conversely, an uncounseled defendant's mental incompetence is more likely to become manifest and thus amenable to the court's evaluation through the course of a criminal trial. Neither of these protective possibilities is present when a mentally disabled defendant proceeds, without counsel, to plead guilty and affirmatively seek the law's harshest and most irrevocable penalty.

II. FOR A MENTALLY DISABLED DEFENDANT TO BE HELD COMPETENT TO WAIVE THE RIGHT TO A TRIAL AND THE RIGHT TO COUNSEL, HE MUST UNDERSTAND THE RIGHTS HE IS RELINQUISHING.

It is well settled that both a guilty plea and a decision to forego the right to counsel involve the waiver of fundamental constitutional rights, and that the test of the adequacy of such waivers is whether the defendant decided to surrender these rights knowingly and intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("intentional relinquishment or abandonment of a known right or privilege"). *Cf. Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver of *Miranda* rights "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it"); *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) ("We have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'"). "It is beyond dispute that a guilty plea must be both knowing and voluntary. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 113 S. Ct. 517, 523 (1992) (citations omitted).[5]

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[5] *Amici* supporting Petitioner appear to agree that this is the capacity necessary for a plea or waiver. *See* U.S. Br. at 11 ("a defendant must as least possess the kind of decisionmaking capacity that is needed to make fundamental choices such as whether to plead guilty and whether to accept the assistance of counsel"); Criminal Justice Legal Foundation (CJLF) Br. at 13 ("While competence and intelligence are not synonymous, they both address the same basic issue: a defendant's capacity to make a knowing and intelligent waiver of his right."). The central disagreement between our position and that of *amici* supporting Petitioner is the relationship between the relevant inquiry into "decisionmaking capacity" and a trial-focused examination under *Dusky*.

Therefore, there can be no disagreement about the standard against which the constitutional adequacy of the defendant's purported waivers is to be measured. The only remaining question is how to determine whether, despite the effect of his mental disability, the relinquishment was "knowing and intelligent" and "made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." Petitioner argues that a trial-focused determination that the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. 402 (1960), is a close enough approximation of the relevant inquiry to assure that the defendant "knowingly and intelligently" waived his rights. We disagree.

A. Defendant Was Entitled, Not to a "Separate" or "Higher" Test, but Rather to an Accurate Inquiry Into His Competence to Waive the Right to Counsel and to Plead Guilty.

Petitioner's concern about a "separate" or "higher" test for competence to waive counsel and to plead guilty creates a false dichotomy. The issue is how a court can gauge adequately whether a defendant has "knowingly and intelligently" waived his counsel and trial rights. That is the test.

Some have concluded that the best way to assure the competence of a guilty plea is to formulate the evaluative inquiry in terms distinct from those in *Dusky*. *See, e.g., Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973); *United States v. Masthers*, 539 F.2d 721 (D.C. Cir. 1976). Others have argued that the same inquiry can be accomplished by using a variant on the *Dusky* formulation. For example, the American Bar Association expresses the test as

> whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether, *given the nature and complexity of the charges and the potential consequences of a conviction*, the defendant has a rational as well as factual *understanding of the proceedings relating to entry of a plea of guilty.*

ABA Criminal Justice Mental Health Standards, Standard 7-5.1(a)(ii) (1989) (emphasis supplied). This formulation's contextual re-statement of the *Dusky* elements "embodies the Association's judgment that a special norm ought to govern plea proceedings." *Id.*, Commentary at 266.

Amici believe that a sufficiently precise and accurate inquiry can be conducted either through a specifically focused *Dusky* inquiry, as suggested by the ABA, or by a distinctly phrased test, as adopted by the Ninth and D.C. Circuits. We agree with Professor Bonnie's conclusion that what matters is not the precise wording of the test, but rather whether the formulation assures an adequate clinical and judicial inquiry into what the defendant understands and whether the defendant can do what is required of him to make a competent waiver of counsel and guilty plea.

> [C]ompetence in the criminal process is best viewed as two related but separable constructs, not as an open-textured single construct. Specifically, I draw a distinction between a foundational concept of competence to assist counsel, and a contextualized concept of decisional competence.

Bonnie, 10 Behavioral Sciences & L. at 294.

The key question regarding guilty pleas and waivers of counsel by defendants with substantial mental disabilities is whether they were able to make those choices intelligently. As Professor Bonnie notes, "Decision-making involves cognitive tasks in addition to those required for assisting in one's defense, . . . including abilities to understand and choose among alternative courses of action." *Id.* at 298. This Court has recognized similar factors as

the appropriate inquiry regarding a capital defendant's competence to withdraw a petition for certiorari. *Rees v. Payton*, 384 U.S. 312, 314 (1966) ("whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises").

The fact that guilty pleas typically emerge from a process of negotiation indicates the kind of capacity that must be required.[6] Claims that an ordinary contract is either void or voidable because of an individual's mental disability focus on "the ability to understand the nature and consequences of the transaction, the ability to act in a reasonable manner in relation to the transaction, ability to understand the character of the transaction, and the ability to understand or agree to the contract." Brakel et al., *The Mentally Disabled and the Law* 439 (3d ed. 1985).[7] It is inconceivable that the law would require less understanding of an agreement to waive constitutional rights in a context that may produce death than it requires for the purchase of a set of encyclopedias.

Mental disability is not a single, global, all-or-nothing phenomenon. Individuals who have a mental illness or mental retardation have the ability, at a particular time, to perform some tasks adequately while being unable,

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[6] In connection with other issues, this Court has evaluated plea negotiations in a manner analogous to other kinds of contracts. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262-63 (1971).

[7] As this Court noted more than a century ago, "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds." *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 20 (1872).

because of their disability, to perform others.[8] In recent decades, the law has come to reflect this truth in a variety of contexts.[9] In the law of guardianship, for example, although it once was common for a determination of incompetence to deprive the individual of all civil rights, "the trend in the law has moved toward requiring courts to examine rights separately to determine whether or not a person has lost the capacity to exercise each particular right." Brakel et al. at 374. Similarly, most states have explicit statutory provisions limiting the effect of involuntary institutionalization on other kinds of competence.[10] *Id.* at 375. In other areas of the law, the idea of differential competence is far from novel. For some time, the law of testamentary capacity has recognized that a declaration of incompetence was insufficient proof to invalidate a will. *See* Allen et al., *Mental Impairment and Legal Incompetency* 283 (1968).[10]

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[8] With regard to mental retardation, the recent revision of AAMR's definition and classification system was specifically designed to reflect more accurately the co-existence in each individual of adaptive skill limitations with "strengths in other adaptive skills or other areas of personal competence." American Association on Mental Retardation (AAMR), *Mental Retardation: Definition, Classification, and Systems of Supports* 39 (9th ed. 1992).

[9] "It is now axiomatic that a person may be competent for one purpose, such as decision-making about medical treatment, but not about others, such as the management of financial affairs. Tests of competence, and the procedures required to resolve doubts about competence, vary from context to context, depending upon both normative and practical considerations. Adherence to the idea that a criminal defendant is competent for all decision-making purposes, or for none, would be anomalous in the face of such a pervasive understanding." Bonnie, 10 Behavorial Sciences & L. at 299.

[10] *Amicus* CJLF may be partially accurate in asserting that in Blackstone's time distinctions were not drawn among degrees and types of mental disability, CJLF Br. at 19 ("A person simply was or was not 'mad.'"). *But see supra* note 3. In any event, the intervening two centuries have seen the rejection of this simplistic view in both the mental disability professions and the law.

Ability to make a rational choice among competing alternatives on a complex issue of great consequence is not an identical skill to knowing what criminal charges the individual is confronting, identifying the roles of the participants in the trial, and communicating with counsel.[11] Ascertaining whether a defendant possesses or lacks one of these capacities does not tell a court what it needs to know about whether the defendant possesses the others. The *Dusky* test provides the court with adequate information for a guilty plea or waiver of counsel *only* if the evaluation is focused on what is demanded of the defendant *in the specific context of the plea or waiver*, as recommended by the ABA.

A defendant may be able to perform what is expected of him in a counseled trial but be unable, at the time, to comprehend and make a competent choice about whether to accept a plea bargain or to competently decide to forego the assistance of counsel. An example would be "a possibly innocent defendant who insists on accepting a plea bargain, against counsel's advice, because he believes that the devil will prevent all defense witnesses from appearing at his trial." Bonnie, 10 Behavioral Sciences & L. at 308.[12] If such a delusional belief were the

[11] *Amicus* CJLF argues that inquiries into trial capacity and competence to waive rights and plead guilty are functionally indistinguishable. "[T]he ultimate question is the same: does the defendant understand what is happening?" CJLF Br. at 22. This characterization is misleading in two ways. First, "what is happening" in the two contexts is very different, and ability to understand one may not be accompanied by ability to understand the other. Second, the passage misleads by casting defendant solely as a passive observer. In trials, and particularly in plea negotiations, defendant has to *do* things, and they are different things, and ability to do one may not automatically indicate ability to do the other.

[12] Professor Bonnie offers other examples that illustrate that defendants may be competent to perform trial functions but not competent to waive rights or plead. *Id.* at 294, 308. He also suggests that there may be some defendants who are competent to plead but not to stand trial. *Id.* at 293-94.

only relevant manifestation of defendant's psychopathology, it would present no barrier to conducting a trial under *Dusky*, but would raise the most serious question of whether the right to a trial had been "knowingly and intelligently" waived. Acceptance of the plea would offend due process, but proceeding with a trial certainly would not.

It has been suggested that courts should deem a trial-competent (*Dusky*) defendant competent to enter a guilty plea despite the fact that he cannot understand the bargain or make a reasoned choice. The reason given for this remarkable proposal is that to recognize the defendant's true inability to plead may create a class of defendants who could be tried but who cannot plead guilty, and who are thus denied the benefit of the potential (and speculative) sentence reduction that might result from a plea bargain.

This policy-driven fiction concerning a defendant's true incompetence will not bear inspection. First it should be noted that the existence of such a sub-group of defendants competent to perform one task but not competent to perform another is not the product or result of the formulation of the test for the waiver's constitutional adequacy. Rather, it is a natural phenomenon; individuals can do some things and not others. The only question is how the constitutional doctrine will address the phenomenon. One way, which Petitioner appears to urge, is to make it go away by pretending it does not exist—by pretending that defendants who cannot understand the choice involved in a waiver or bargain are competent because they *could* have understood a trial.

Another approach would be to elevate the interpretation of the *Dusky* standard itself to require that before a defendant can be *tried* he must "possess the kind of decisionmaking capacity that is needed to make fundamental choices such as whether to plead guilty and whether to accept the assistance of counsel." U.S. Br.

at 11. *See also id.* at 18. This proposal would eliminate the existence of a group of defendants who can be tried but who cannot plead guilty, but does so at an extraordinary cost. If implemented, it would render incompetent to stand trial a substantial number of mentally disabled defendants who are currently found to be able to understand the proceedings and assist counsel. It is difficult to imagine how the criminal justice system's interests are advanced by refusing to adjudicate the cases of defendants who *could* stand trial on the grounds that they *would* not be able to understand a hypothetical plea agreement *that does not exist in their case.*[13]

There is no perfect solution to the issue of the potential "gap" between triability and competence to plead.[14] The best approach would be to accept any guilty pleas from defendants who are competent to understand the rights they are waiving, and try those defendants who meet the actual *Dusky* test (as compared to its more demanding replacement suggested by the United States). Although this may result in some theoretical unfairness to defendants who cannot plead, this does not raise a constitutional issue because, as this Court has held, there is no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

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[13] The suggestion for a more inclusive set of requirements for all *Dusky* evaluations is not only undesirable, it is also inaccurate as a description of what *Dusky* findings currently mean. Clinicians have been, and are currently, asked whether a particular defendant can stand trial, not the more expansive questions hypothesized by the United States. Even if this Court were to revise the interpretation of *Dusky* to encompass cognitive and decisional capabilities that are not now included, it would not magically render the previous evaluations of defendants like Respondent more comprehensive.

[14] The size of the group of defendants who may be denied the benefits of plea bargaining can be reduced, of course, by treatment or educational efforts designed to remove the impediment to decisional competence. *See* Ellis & Luckasson, 53 Geo. Wash. L. Rev. at 466 n. 286.

We agree with the Solicitor General that "the narrow purpose of the *Dusky* test is to determine the effect, if any, that a defendant's mental impairment can be expected to have on his ability to function adequately during trial." U.S. Br. at 10 (citation omitted). The present case raises the question of whether, without modification to focus on the context of a guilty plea, evaluations under *Dusky* can be put to a second, different purpose. We believe that the clinical inquiries about the two sets of skills are so different that one cannot serve as an approximation of the other.[15] Thus, the issue is not whether the Court should adopt a "different" test, but rather whether the clinical and judicial evaluation should be directed to the proper question: was defendant able to understand what needed to be understood and to do what he was required to do in order to make a competent waiver of counsel and plea of guilty.

B. Mental Disability Professionals Have the Ability to Evaluate Specific Abilities and Deficits that Relate to Competence Issues in the Criminal Justice System.

Petitioner states that "while there are currently psychological experts who claim to be able to determine an individual's competency to stand trial under the general standard of *Dusky*," it expresses doubt whether clinicians are capable of determining whether or not a defendant fully understands the factors that may be involved in a guilty plea. Pet. Br. at 31-32 (citation omitted). Similarly, Petitioner's supporting *amicus* worries that the "subtle distinctions" between trials and guilty pleas are "irrelevant for such an inexact science," CJLF Br. at

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[15] It is possible, of course, to evaluate a defendant's competence for different skills and different contexts in a single clinical evaluation, as long as the clinician is asked to address the specific skills and contexts. But absent such multiple inquiries, a clinical report on one issue will not provide a court with adequate information on the other.

22, and states that "[i]t is unreasonable to expect the mental health sciences to make such a fine distinction." *Id.* at 29.

These concerns are misplaced.

Mental disability professionals have the ability to assist the courts in performing competence evaluations that focus specifically on those skills and abilities the defendant is required to have in a particular context. This is especially true when the issue, as with a guilty plea and waiver of counsel, involves an individual's *present* mental condition, rather than an attempt to reconstruct that condition at a previous time (as with the insanity defense) or to project the likelihood of future dangerous conduct. This distinction is explicitly reflected in the ABA's recommendation that different levels of clinical expertise be required for expert evaluators and witnesses in these three categories. *ABA Criminal Justice Mental Health Standards*, Standard 7-3.12 (1989). "[A]ssessments of competency or other issues of present mental condition may be made more easily than those requiring a reconstruction of mental condition at the time of an alleged crime or a prediction of future mental condition or behavior." *Id.*, Commentary at 143-44. *See* Melton et al., *Psychological Evaluations for the Courts* 80 (1987).

Professional evaluations have been developed successfully to address many different contexts in which particular kinds of competencies are required of an individual with mental disabilities. *See, e.g.*, Appelbaum & Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 25 New England J. Med. 1635, 1636 (1988);[16] Tepper & Elwork, *Competence to Consent to Treatment As a Psycholegal Construct*, 8 L. & Human Behavior 205 (1984); Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 Crim. Justice & Behavior 147 (1990); Lindsey & Luckasson, *Consent Screening Interview for Community Residential Placement: Report on the Initial Pilot Study Data*, 29 Mental Retardation 119 (1991); Appelbaum & Roth, *Competency to Consent to Research: A Psychiatric Overview*, 39 Archives Gen. Psychiatry 951 (1982). *See generally* Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (1986). While there are common threads of analysis, each of those contexts requires the clinician to focus on the specific information the disabled individual is required to understand, and the particular tasks (such as decisionmaking) that must be performed.[17]

Clinical evaluators can assess the individual's competence to perform different tasks (e.g., competence to stand trial and competence to enter a guilty plea) in the same evaluation, but such an evaluation must focus separately on each of the issues presented. *See* Miller & Germain, *The Specificity of Evaluations of Competency to Proceed*, 14 J. Psychiatry & L. 333 (1986). Requiring that the evaluation address the relevant abilities and disabilities of a defendant is hardly extraordinary; indeed, it is artificial to ask the clinician to make a global assessment under the general label of "competence," a term which has no independent clinical meaning.

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[16] This brief takes no position on the contours of the right to consent to, or to refuse, treatment.

[17] A similar contextual approach to consent issues was recommended in the area of medical decisions. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavorial Research, 1 *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 55-62 (1982). "In the view of the Commission, any determination of the capacity to decide on a course of treatment must relate to the individual abilities of a patient, *the requirements of the task at hand*, and the consequences likely to flow from the decision. *Id.* at 57 (emphasis supplied).

If the clinician is not asked to address the defendant's ability to perform the relevant tasks in a particular context, the result will either be a generalized assessment of the ability to do nothing in particular, or a more targeted evaluation of the ability to do a task different from the one in question. Neither permits the court to make an accurate appraisal of whether the defendant is competent to waive counsel and plead guilty.

C. The Evaluation of Respondent's Competence to Waive Counsel and Plead Guilty to a Capital Charge Did Not Satisfy the Requirements of Due Process.

The trial court in this case, when it accepted Respondent's waiver of counsel and guilty plea, relied upon two psychiatric reports, each of which addressed the wrong question. Both psychiatrists, as they had been asked to do, had limited their inquiry and final evaluation solely to whether Respondent was competent to stand trial. (J.A. 8, 17). Dr. Jurasky's report, for example, focused specifically on Respondent's ability to perform tasks which were directly related to skills needed at trial. He concluded that Respondent was able to "aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so." (J.A. 8). Neither psychiatrist was asked and neither considered whether Respondent could knowingly and intelligently waive his right to counsel and plead guilty to the offenses with which he had been charged.

In addition, when Respondent entered his guilty plea, there was ample evidence before the trial court which should have raised substantial doubts about the validity of the plea. The court knew that Respondent had attempted suicide (J.A. 5-6) by shooting himself in the abdomen a few months before. *Cf. Drope v. Missouri*, 420 U.S. 162, 180 (1975) (defendant's suicide attempt was a factor justifying further inquiry into his competence). Moreover, Dr. Jurasky's report informed the court that during the interview Respondent reported having "little logical or consistent recall" of the murders themselves. (J.A. 5). Dr. Jurasky also noted that Respondent was depressed. (J.A. 7).[18] *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 218-25 (3d ed. rev. 1987); Lesse, *Masked Depression and Depressive Equivalents* in 7 *American Handbook of Psychiatry* 322-24 (Arieti, ed., 2d ed. 1981).

Finally, during the plea colloquy itself, Respondent informed the court that he was then under the influence of medications given to him at the jail. (J.A. 33). *Cf. Riggins v. Nevada*, 112 S. Ct. 1810 (1992). Inexplicably, rather than inquiring further about what medications Respondent had been given or in what way those medications were affecting him, the trial court dropped that subject and turned to a different line of questioning. (J.A. 33).

The net result was that the trial court, confronting an unrepresented individual with serious and obvious signs of mental impairment, made a judgment that Respondent was competent to waive counsel and to plead guilty to a capital charge based on evaluations that never considered his competence in that context. Such a procedure carries far too high a risk that Respondent was incompetent to make such waivers and such a plea. Due process required the court to seek specific information from the clinical evaluators about decisional competence, and to make further inquiries about the medications and about Respondent's ability to understand the waivers.

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[18] Dr. O'Gorman's report, subsequently filed with and relied upon by the court, noted that Respondent was "very depressed." (J.A. 15).

III. THE CONSTITUTIONAL STANDARD FOR MEASURING COMPETENCE TO PLEAD GUILTY HAS PARTICULAR IMPORTANCE FOR DEFENDANTS WHO HAVE MENTAL RETARDATION.

Although Respondent in the case at bar is an individual with mental illness, this Court's formulation of the requirements for guilty pleas [19] will have a major impact on defendants who have mental retardation.[20]

Guilty pleas by defendants with mental retardation present especially serious competence problems. *See generally Henderson v. Morgan*, 426 U.S. 637 (1976). The first concern is that their factual reliability is open to more serious question than is typical with guilty pleas. The well documented problems of biased responding and acquiescence to authority [21] are often exacerbated by the individual's limited vocabulary and inability to understand

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[19] *Faretta* claims by defendants with mental retardation do not appear to be a common occurrence.

[20] "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). Although people with mental retardation constitute only about 3% of the population, the disability presents substantial difficulties in the process of criminal adjudication. *See generally The Criminal Justice System and Mental Retardation: Defendants and Victims* (Conley et al. eds., 1992).

[21] *See, e.g.*, Sigelman et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 Mental Retardation 53 (1981); DeVellis, *Learned Helplessness in Institutions*, 15 Mental Retardation 10 (Oct. 1977); Ellis & Luckasson, 53 Geo. Wash. L. Rev. at 427-32, 445-52.

the concepts inherent in a particular admission.[22] Beyond the issue of reliability, there is reason for concern about what the defendant actually understands concerning the rights he is waiving and the bargain to which he will be held. *See* President's Committee on Mental Retardation, *Report to the President: Citizens with Mental Retardation and the Criminal Justice System* 10 (1991). At the most basic level, for example, bargaining for a sentence of five years to preclude a potential sentence after trial of 20 years is meaningless to a mentally retarded defendant whose arithmetical skills do not include counting that high.[23] "To give a person liberty to choose between alternatives of which he can have no appreciation is to defeat and mock the concept of liberty." President's Panel on Mental Retardation, *Report of the Task Force on Law* 15 (1963).

In cases involving mental retardation, it is particularly important to ensure that the defendant actually understands the terms of the plea and that there is an adequate factual basis for it. *See Henderson*, 426 U.S. at 645 n. 13. For these defendants, a conventional *Dusky* evaluation of trial competence will not provide adequate information to evaluate the former, and typical monosyllabic acquiescence during the plea colloquy is likely to give the trial judge a misleading picture of what the defendant understands and admits.[24] "The competence

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[22] *See, e.g.*, Ellis & Luckasson, 53 Geo. Wash. L. Rev. at 466 n. 286; *United States v. Masthers*, 539 F.2d 721, 724-25 n.20 (D.C. Cir. 1976).

[23] *See* McClennen, *Cognitive Skills for Community Living: Teaching Students with Moderate to Severe Disabilities* 236 (1991).

[24] While the standard plea colloquy is likely to be satisfactory for nondisabled defendants, the American Bar Association's recommendation regarding individuals whose comprehension is open to question is particularly appropriate and essential to evaluate the understanding of defendants who have (or may be suspected to have) mental retardation. *See* ABA, *Standards for Criminal Justice*, Standard 14-1.4(b) (2d ed. 1980).

of a defendant with mental retardation to plead guilty requires careful assessment in order to assure both that the admissions embedded in the plea are reliable *and* that the defendant understands the nature and consequences of the plea. Routine attorney-client interactions and routine plea colloquies will not do the job." Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. Crim. L. & Criminology 419, 444 (1990).

A ruling by this Court in the instant case that a trial-focused *Dusky* evaluation and a routine plea colloquy were sufficient to demonstrate competence to plead guilty to a capital crime would invite, in mental retardation cases, the acceptance of incompetent pleas that defendants did not understand and that may be unsupported by a factual foundation worthy of belief.

CONCLUSION

For the aforementioned reasons, *amici* urge the affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ,
Warden, Ely State Prison,

Petitioner,

—v.—

RICHARD ALLAN MORAN,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NEVADA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a trial court is constitutionally required to ascertain specifically a defendant's competency to waive counsel and to plead guilty, notwithstanding the court's prior determination of the defendant's competency to stand trial with the assistance of counsel.

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases addressing the relationship between mental competency and the criminal justice system. The ACLU of Nevada is one of its statewide affiliates.

STATEMENT OF THE CASE

Respondent Richard Moran, a chronic abuser of cocaine and other drugs and a past abuser of alcohol, was charged in a Nevada state court in 1984 with three counts of capital murder. Moran was accused of robbing and killing two strangers in a bar and, several days later, killing his former wife before shooting himself in the abdomen in an apparent suicide attempt. Initially, he pled not guilty to all charges.

In September 1984, the court ordered a psychiatric evaluation of Moran to determine whether he was competent to stand trial. The two psychiatrists who examined respondent framed their evaluations in terms geared to the acknowledged standard for competency to stand trial. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 172 (1975).[2] Dr. Jurasky filed his report with the court on September 19, 1984, and found Moran to be "in full control of his faculties insofar as his abilities to aid counsel,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Joint Appendix ("J.A.") 8 (Dr. Jurasky), 17 (Dr. O'Gorman).

assist in his own defense, recall evidence and to give testimony if called upon to do so. The only difficulty would be his difficulty in recalling relevant material while he was under the influence of either alcohol and/or cocaine."[3] Dr. O'Gorman, who examined Moran on September 12, did not file his report with the court until at least November 28, 1984.[4] He concluded that Moran was "knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, *if he so desires*. He is fully cognizant of the penalties if convicted."[5] However, Dr. O'Gorman also noted that Moran "does not recall, specifically, shooting two people in the bar, but he is fully aware of the circumstances, which he

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[3] J.A.8. In fact, earlier in his report Dr. Jurasky noted: "As to the murders themselves, the defendant appears to have little logical or consistent recall. He states, 'I have visions of myself pointing the gun at the victims, but I can't see them. I can see my wife's dead body, but I can't see myself.' Other than that, he has spotty recollection of events after the police picked him up . . . . He was willing to talk to the best of his ability about the homicides in the bar, but all he could state was 'I don't even know what those poor two people in the bar look like. I can only see myself holding the gun," J.A.5-6. Dr. Jurasky concluded that Moran's "memory at the present time seems to be grossly intact for recent and remote events except for when under the heavy influence of alcohol and cocaine." *Id.* at 7. Moran told Dr. Jurasky that "he had been using cocaine very heavily for many months and two weeks prior to these incidences [sic] had been free-basing", *id.* at 4-5.

[4] That is the date on the report. J.A.10. The record does not establish when the O'Gorman report was actually received in the trial court, if it ever was; the trial judge relied upon the Public Defender's characterization of O'Gorman's findings during the plea hearing.

[5] J.A.17 (emphasis added). Both evaluating psychiatrists indicated that respondent might not be inclined to defend himself in the imminent judicial proceedings. Dr. O'Gorman observed that respondent had "a desire to accept capital punishment." J.A.16. Dr. Jurasky noted that "this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense but I do not feel that it is necessarily a major consideration." J.A.8.

claimed he learned later."[6]

Both examining psychiatrists observed that Moran was a heavy user of cocaine and that, in the period immediately prior to the murders, he had "used as much as he could get his hands on, [and] used up all his money, spending it on cocaine."[7] He told Dr. O'Gorman that he "ha[d] a severe need, to continue to use it."[8] He told Dr. Jurasky, "I just had to get more and more of it."[9] Summarizing his findings, Dr. O'Gorman wrote:

> It is the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy. I feel this is a tragic case that involved the death of three people and the ruination of a fourth and presents a severe indictment to anyone who would argue about the deadly and addictive qualities of cocaine abuse.[10]

In November, Moran, who was taking four different prescription drugs to control cocaine seizures,[11] appeared in court to ask that he be permitted to discharge his public defenders and to change his previously entered

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[6] J.A.10.

[7] J.A.12 (O'Gorman Report); *see also id.* at 4-5 (Jurasky Report).

[8] J.A.12.

[9] J.A.5.

[10] J.A.9.

[11] Moran had been prescribed Inderal, a beta-blocker anti-arrhythmic that causes mental depression, lightheadedness, hallucinations, disorientation, and short-term memory loss; Dilantin, an anti-seizure medication that causes confusion; Vistaril, a depressant that causes drowsiness, tremors and convulsions; as well as phenobarbitol. J.A.92-95, 97-98.

pleas to guilty. He told the judge that he wanted to waive his right to counsel in order to ensure that no witnesses or mitigating evidence would be presented on his behalf in the sentencing phase of the proceeding.[12]

The trial judge questioned Moran at length, securing monosyllabic affirmative answers to a sequence of questions about whether he understood the elements of the offenses to which he sought to plead guilty, and the factors affecting the potential penalties, including aggravating and mitigating circumstances.[13] After a string of "uh-huh," "yeah," "yeah, I do," "yes" and "right" responses, with which Moran purported to agree that he knew the import of waiving his constitutional rights, understood the charges against him and was in fact guilty of those charges, this exchange ensued:

THE COURT: Are you pleading guilty because in truth and in fact you are guilty?

DEFENDANT: Yes.

THE COURT: In Case No. C67482 -- you have the Information in front of you?

DEFENDANT: Yes, sir, uh-huh.

THE COURT: On the 11th day of August, 1984, you were charged that within the County of Clark in the State of Nevada that you did then and there, without authority of law and with malice aforethought willfully and feloniously kill Linda K. Vanderwoort [sic], a human being, by shooting at and into the body of said Linda K. Vandervoort with a deadly weapon: To wit, a firearm.

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[12] J.A.32.

[13] J.A.23-57.

Do you understand all of the allegations in that Information?

DEFENDANT: Yes.

THE COURT: Did you do those things?

DEFENDANT: Yes.

THE COURT: Did you do so deliberately, with premeditation and malice and aforethought --

DEFENDANT: *Not really.*

THE COURT: -- as I've explained to you?

DEFENDANT: *No, I didn't do it -- I mean, I wasn't looking to kill her, but she ended up dead.*

THE COURT: Well, you're charged that you did, with malice aforethought, shoot at and into the body of Linda K. Vandervoort with a deadly weapon, a firearm. Did you do that?

DEFENDANT: Yes.

THE COURT: And did you do so deliberately and with premeditation?

DEFENDANT: *No.*

THE COURT: Did you think about it before you did it?

DEFENDANT: *Not really.*

THE COURT: Did you do it deliberately?

DEFENDANT: *I don't know. I mean, I don't know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn't plan on doing it; you know what I mean?*

THE COURT: Well, I've previously explained to you

what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration for and against the proposed action. Did you do that?

DEFENDANT: Yes.

THE COURT: And the word premeditated means considered beforehand. Did you do that?

DEFENDANT: Yes.

THE COURT: And you remember the definition I gave you regarding malice aforethought?

DEFENDANT: Uh-huh.

THE COURT: A malice can be either expressed or implied; that express malice is the deliberate intention to unlawfully take away the life of a fellow creature. Did you do that?

DEFENDANT: Yes.[14]

Following this exchange, Moran again subsided into a series of monosyllables affirming the statements of the trial judge as he was led through a substantially similar colloquy with respect to the murders in the bar -- the offenses for which Moran is currently under sentence of death.[15] Though the court asked Moran whether he was presently taking any medication and, though he answered

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[14] J.A.57-60 (emphasis added throughout).

[15] On automatic appeal after Moran was sentenced to death on all three murder counts, the Nevada Supreme Court affirmed the sentence of death with respect to the bar killings, but overturned the finding of aggravating circumstances on the other count and remanded for resentencing to the trial court. Appendix to Petition for *Certiorari* ("Pet.App.") C1-C16.

that he was, the court explored no further to determine the type and quantity of drugs involved, let alone their possible psychological or emotional effects.[16]

Moran's waiver of counsel and guilty pleas were accepted by the trial court at the November hearing without any new evaluation of Moran's mental competency.[17] Instead, Moran was found competent to waive counsel and plead guilty based entirely on the court's familiarity with Dr. Jurasky's report and on a brief and inaccurate presentation by the public defender about the expected content of Dr. O'Gorman's report, which apparently had not yet been filed.[18] Both doctors had evaluated Moran's competency to "assist his attorney, in his own defense";[19] yet the court rested on those evaluations to find him competent to waive his constitutional right to the assistance of an attorney.[20] The trial judge did advise Moran that he was "unwise" to proceed without counsel,[21] but

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[16] THE COURT: Are you presently under the influence of any drug or alcohol?

DEFENDANT: Just what they give me in, you know, medications.

J.A.33.

[17] J.A.64 ("The Court finds that the defendant's plea of guilty to the charge in Case No. C67482, and the defendant's pleas of guilty to the charges in five counts in Case No. C67483 to be freely and voluntarily given; further finds that the defendant understands the nature of the offenses and the consequences of his pleas and therefore accepts the pleas of guilty").

[18] J.A.20-21. Drawing on a conversation with Dr. O'Gorman, the public defender stated that, in the doctor's view, Moran "could distinguish between right and wrong and also understood the nature of his acts" at the time of the alleged murders. These conclusions are nowhere in evidence in Dr. O'Gorman's eventual report. *Id.*

[19] J.A.8, 17.

[20] J.A.21.

[21] J.A.23.

whether Moran possessed the competency to appreciate his unwise choice was never the subject of inquiry.

Moran appeared without counsel at his sentencing hearing in late January 1985. He conducted no defense, presented no witnesses, and offered no mitigating evidence on his behalf. On each of the three counts, the three-judge sentencing panel found aggravating circumstances, and sentenced Moran to death. The Nevada Supreme Court ultimately reversed the finding of aggravating circumstances with respect to the killing of Moran's former wife, and remanded for a new sentencing hearing on that count, at which Moran received a life sentence. The other two death sentences were affirmed.[22]

In mid-1987, Moran sought to overturn the convictions, in state court, on the grounds that he had been incompetent to proceed without counsel and to plead guilty. After an evidentiary hearing in April 1988, the Nevada appellate court found that Moran had been competent when he discharged his attorneys and submitted his guilty pleas.[23] The Nevada Supreme Court affirmed.[24]

Moran then petitioned the federal district court for a writ of habeas corpus, which was denied. The Ninth Circuit reversed. The circuit court held that the trial court failed to initiate a new competency inquiry when Moran sought to waive counsel, to plead guilty and to ensure that no defense would be presented on his behalf. Further, the court below decided that the subsequent state appellate court evidentiary hearing on the question of competency had failed to cure the initial defect, because the appellate hearing relied on psychiatric evaluations of Moran's competency to stand trial which were not and

[22] Pet.App. C.

[23] Pet.App. D.

[24] Pet.App. E.

could not have been directed at his later competency to discharge counsel and waive a defense entirely.

SUMMARY OF ARGUMENT

Petitioner does not and cannot dispute certain basic legal principles that form the necessary backdrop for this case. First, an incompetent person can neither be tried nor convicted without violating due process, *Dusky v. United States*, 362 U.S. 402 (1960)(*per curiam*). Second, any waiver of fundamental constitutional rights by a criminal defendant, including those waived by proceeding *pro se* and pleading guilty, is invalid unless it is knowing and intelligent, *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Third, an incompetent defendant cannot validly waive his constitutional rights under the *Zerbst* standard, *see Chapman v. United States*, 553 F.2d 886, 892 n.10 (5th Cir. 1977).

The disagreement arises in applying these legal principles to the facts of this case. On that question, we disagree with petitioner's automatic assumption that a defendant who is competent to stand trial with the assistance of counsel is, *ipso facto*, equally competent to plead guilty without counsel. Such a notion is at odds both with this Court's precedents, *Massey v. Moore*, 348 U.S. 105 (1954); *Dusky*, 362 U.S. 402; *Westbrook v. Arizona*, 384 U.S. 150 (1966)(*per curiam*), and with clinical recognition of the principle of contextual competency.

Accordingly, a trial court is under a continuing duty to determine a defendant's competency whenever intervening circumstances or new evidence warrant. *Drope v. Missouri*, 420 U.S. 162. This duty is a fundamental tenet of constitutional due process. Here, that duty should have triggered a renewed and focused inquiry into Moran's competency when he sought to discharge his lawyers and reverse his previously entered not guilty pleas to capital murder. Instead, the court relied on

prior psychiatric evaluations dealing with Moran's ability to assist counsel, although those evaluations did not address the very different question of Moran's competency -- emotional, psychological, and intellectual -- to make life or death judgments in the absence of counsel.

Properly framed, the issue in this case is not whether due process requires a *higher* standard of competency to waive certain rights than to stand trial with counsel's assistance. Rather, due process requires that courts *specifically* determine competency in both contexts. *Massey v. Moore*, 348 U.S. 105; *Westbrook v. Arizona*, 384 U.S. 150; *Dusky v. United States*, 362 U.S. 402. Because that specific determination was not made by the Nevada courts in this case, the decision below should be affirmed.

ARGUMENT

I. A DEFENDANT'S DECISION TO DISCHARGE COUNSEL AND PLEAD GUILTY IN A CAPITAL CASE CAN ONLY BE KNOWING AND INTELLIGENT FOR DUE PROCESS PURPOSES IF THE DEFENDANT POSSESSES THE REQUISITE MENTAL COMPETENCY

When Moran appeared at his plea hearing in November 1984, he expressed a desire to waive a number of federal constitutional rights. Whether the state court properly accepted Moran's waiver as valid "is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 243 (1968), *citing Douglas v. Alabama*, 380 U.S. 415, 422 (1965). The task of the federal courts on collateral review in this case is ascertain whether the trial court adhered to those federal standards in accepting Moran's *pro se* guilty plea.

Under this Court's well-settled rules, the validity of any constitutional waiver ultimately turns on a clear showing that the defendant has made "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. at 464; *see also Carnley v. Cochran*, 369 U.S. 506 (1962)(both right to counsel cases). Moreover, in enforcing this standard, the trial court may not accept any waiver of constitutional rights that is not "intelligent and competent." *Zerbst*, 304 U.S. at 465.[25]

By definition, a guilty plea entails the waiver of several important constitutional rights and privileges. *Boykin v. Alabama*, 395 U.S. at 243; *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Thus, in *Boykin*, this Court stressed the significance of a guilty plea even when the defendant is represented. Noting that the defendant in *Boykin* (like respondent here) was pleading guilty to capital murder, this Court insisted on "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the [guilty] plea connotes and of its consequence." 395 U.S. at 244.[26] *See also Carnley v.*

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[25] As this Court stated in *Zerbst*:

> The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

304 U.S. at 465. This passage illustrates the irrelevance of the United States' point that, until this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), denial of the right to counsel violated due process only if "special circumstances" obtained which required counsel to ensure fairness. Brief of United States as *Amicus Curiae* at 21. To the contrary, this Court took a more expansive view of due process even in the pre-*Gideon* era. For example, in *Massey v. Moore*, 348 U.S. at 108, this Court noted: "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."

[26] *Boykin*'s "utmost solicitude" is, of course, in keeping with this (continued...)

Cochran, 369 U.S. at 513 (trial court has affirmative duty to see that waiver of counsel is made "intelligently and understandingly").

Where the defendant is unrepresented, as respondent was in this case, the knowing and intelligent standard articulated in *Zerbst* must also incorporate a judgment about the defendant's mental competency if it is to make any sense. *See, e.g., Chapman v. United States*, 553 F.2d at 892 n.10. Indeed, the United States makes precisely this point in its brief supporting petitioner in this case. Brief of United States at 12 ("The determination that a defendant understands the nature and consequences of waiving his rights necessarily implies that he is competent to do so"); *see also* Brief of Criminal Justice Legal Foundation as *Amicus Curiae* at 20. As a threshold matter, therefore, there is general agreement that the notion of a "knowing and intelligent waiver" of rights, and the notion of the defendant's competency, are inextricably related.

We disagree, however, with petitioner and his *amici*, about the nature of that relationship. According to the United States, the trial court's determination that Moran appreciated the consequences of his guilty pleas was functionally indistinguishable from a determination of his competency to plead guilty. Thus, the trial court's failure to make the latter finding specifically and on the record is not significant. In fact, it is a critical failing because it illuminates the trial court's failure to appreciate

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[26] (...continued)
Court's longstanding recognition that "death is different," and that an "especial concern" with due process in capital cases "is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

the contextual nature of the competency inquiry.[27] Thus, the court's reference at the plea hearing to earlier evaluations of Moran's competency to stand trial only highlights the due process problem. It clearly does not solve it.

II. AN INITIAL DETERMINATION OF COMPETENCY TO STAND TRIAL WITH COUNSEL DOES NOT NECESSARILY SUFFICE TO ASSURE THE TRIAL COURT OF THE DEFENDANT'S CONTINUING COMPETENCY TO DISCHARGE COUNSEL, PLEAD GUILTY AND SUSPEND HIS OWN DEFENSE IN A CAPITAL CASE

The trial court's duty to investigate Moran's competency when he moved to discharge counsel and plead guilty was not and could not have been discharged by the court's reliance upon earlier psychiatric determinations that Moran was competent to stand trial. Nor was the trial court's derogation of its duty to make a specific inquiry into Moran's competency cured by a subsequent evidentiary hearing that cited to those initial psychiatric evaluations.[28] Respondent's decision to discharge counsel and plead guilty occurred well after the psychiatric evaluations ordered by the trial judge had been completed. And, critically, the psychiatrists who performed those evaluations were never asked to determine Moran's competency to enter a guilty plea and to proceed without

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[27] Moreover, the validity of a defendant's proposed waiver of constitutional rights is not a question to be mechanically assessed according to a rote formula. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. at 464.

[28] Pet.App. D.

counsel.

In *Drope*, this Court found that the trial court had wrongly relied on the report of a psychiatrist who had not been asked to address "medical facts bearing specifically on the issue of petitioner's competency to stand trial, as distinguished from his mental and emotional condition generally." 420 U.S. at 176. Here, similarly, the state trial and appellate courts looked to psychiatric evaluations that addressed Moran's competency to stand trial during the period when he intended to present a defense with the assistance of counsel after entering pleas of not guilty. Such a psychiatric foundation is inadequate to support the courts' conclusion that Moran later was competent when he discharged his attorneys and proffered his guilty pleas.

As one commentator has noted, competency to waive counsel and proceed *pro se* is "by all accounts a separate construct" from competency to assist counsel in the presentation of a defense.[29] This is the only approach consonant with the premise, recognized by this Court in *McMann v. Richardson*, 397 U.S. 759, 768-71 (1970), that in many instances an attorney's competent advice precludes a defendant's subsequent attack on his guilty plea, which would be vulnerable to challenge as "involuntary" absent the assistance of counsel.

The notion that competency to assist in one's defense by counsel, and competency to waive one's defense without counsel, are not coterminous concepts, is hardly

[29] "[C]ourts have uniformly concluded, in the wake of *Faretta*, that [the right of self-representation] prevails *only* if the defendant satisfies a more demanding test of decisional competence than would otherwise be required for adjudication with counsel." Bonnie, "The Competence of Criminal Defendants: A Theoretical Reformulation," 10 Behav. Sci. & the Law 291, 299-300 & n.40 (1992)(citing cases).

new to this Court.[30] "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Massey v. Moore*, 348 U.S. at 108. Based on this understanding, the *Massey* Court read the contemporary due process requirement of a fair trial to mean that a defendant competent to stand trial with the assistance of counsel could nonetheless be incompetent to present his own defense not due to lack of legal skill or sophistication, but due to insanity or other mental impairment. "Even the sane layman may have difficulty discovering in a particular case the defenses which the law allows . . . . Yet problems difficult for him are impossible for the insane. Any defense is hopelessly beyond reach for an accused who is insane." *Id.* at 108-09.

Despite the United States' efforts to narrow its holding, Brief of United States at 20-21, the import of *Massey* could not be clearer. *Massey*'s rule is that the trial court must ascertain whether a defendant is competent to represent himself without counsel. Further, while such a determination may occur at the same time as the judgment regarding the accused's competency to stand trial, it is a distinct obligation of the trial court that must be consciously discharged before a defendant may be allowed to proceed uncounseled. Indeed, the *Massey* Court ordered a new hearing on the defendant's compe-

[30] Nor is it controversial from a clinical perspective. *See, e.g.*, Roesch & Golding, COMPETENCY TO STAND TRIAL 10-13 (1980); American Bar Association Criminal Justice Mental Health Standards, Standard 7-4.1 Commentary at 175 ("Competence is functional in nature, context-dependent and pragmatic in orientation"). *See also* Bonnie, *supra* n.27, at 292.

The requirement that competency be determined contextually is a long established canon of mental health jurisprudence outside the criminal context as well. *See generally* Winick, "Competency to Consent to Treatment: The Distinction Between Assent and Objection," 28 Hous.L.Rev. 15 (1991).

tency to proceed without counsel because the lower courts had never separated the two inquiries, merely finding an all-purpose competency. "That may mean that the evidence to support the finding that petitioner was competent to stand trial with a lawyer was also sufficient to sustain the conclusion that he was competent to stand trial without a lawyer. It may mean that in the view of the district court the two issues are the same [an incorrect legal conclusion, in this Court's view]. The present record leaves us in doubt." *Id.* at 108.

In *Westbrook v. Arizona*, 384 U.S. 150, the Court reiterated the distinction between competency to stand trial with counsel, and competency to proceed uncounseled. "Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." *Id.* If the latter is in doubt, it must be determined in a discrete inquiry before the trial court may accept a waiver of the right to counsel.[31] Lower courts have consistently read *Westbrook* for that straightforward proposition.[32]

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[31] The argument that, "at most," *Westbrook* requires a separate inquiry into a defendant's competency to waive counsel only when he intends to conduct a defense, rather than to plead guilty, is misplaced. Brief of United States at 16 ("a defendant's choice to forgo counsel's advice does not necessarily entail his active self-representation during trial. [Here, Moran] did not intend to represent himself at trial, but intended to plead guilty"); *id.* at 22-23 n.6, *citing Splitt v. United States*, 364 F.2d 594, 598 (6th Cir. 1966), *cert. denied*, 385 U.S. 1019 (1967). An accused's choice to plead guilty rather than proceed to trial is as much an act of legal self-representation as the conduct of a trial, and the consequences are perhaps more definitive. Thus, the ability to make the decision rationally is as crucial, if not more so, than the ability to rationally undertake the conduct of a trial on one's own behalf.

[32] *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 754 (2d Cir. (continued...)

This Court in *Drope* underscored the principle that judgments about competency are necessarily contextual. "[A] defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies." 420 U.S. at 176. That observation applies with particular force here. The acknowledged standard for determining competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . ." *Dusky v. United States*, 362 U.S. at 402. As the Ninth Circuit recognized, however, the decision to waive counsel and to conduct an uncounseled defense (or to waive a defense by an uncounseled guilty plea) raises different issues of competency.[33] "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. at 466. *See also Matusiak v. Kelly*, 786 F.2d 536, 543 (2d Cir. 1986).

It is that "distinct" question that was never addressed

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[32] (...continued)
1975); *Government of Virgin Islands v. Niles*, 295 F.Supp. 266 (D.V.I. 1969). "[*Westbrook v. Arizona*] holds unequivocally, that an adjudication by the trial court that an accused is capable of going to trial and aiding his counsel, is not a determination of his competency to act as his own counsel. When the accused demands his constitutional right to act as his own counsel, the trial court is faced with the necessity of making a factual determination of the competency of the accused to: (1) intelligently waive the services of counsel, and (2) act as his own counsel." *State v. Kolocotronis*, 436 P.2d 774, 781 (Wash.Sup.Ct. 1968). *See also* Silten & Tullis, "Mental Competency in Criminal Proceedings," 28 Hastings L.J. 1053, 1065-72 (1977).

[33] In light of the ample support in this Court's prior cases for the Ninth Circuit's contextualized approach to competency, there can be no justification for the United States' suggestion that the court below introduced a "new category of competence." Brief of United States at 20.

by the state courts in this case. Moreover, in the absence of a focused inquiry, it is uncertain on this record whether Moran "possesse[d] an understanding of the law in relation to the facts." His colloquy with the trial court at the plea hearing strongly suggests that he may not have appreciated the legal significance of his statement that he did "not really" act with premeditation or malice. *See* p.5, *supra*. The evaluation by Dr. O'Gorman leaves some doubt whether Moran was capable of forming the requisite intent for capital murder.[34] Finally, it is entirely unclear, because no one ever asked, whether Moran was emotionally competent (as opposed to cognitively able) to weigh the legal options available to him at the plea hearing. As set forth more fully below, this ambiguity demanded further inquiry, especially when respondent's life was at stake.

III. THE TRIAL COURT HAD A CONTINUING OBLIGATION TO DETERMINE RESPONDENT'S COMPETENCY IN LIGHT OF CHANGED CIRCUMSTANCES AND THE EVOLVING POSTURE OF THE PROCEEDINGS

"Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S at 181. Contrary to the view expressed by the United States, Brief of United States at 9, 11-12, the trial court wrongly separated its inquiries into Moran's mental competency, and

[34] "[A]t the actual time, if he were under the influence of large amounts of cocaine, particularly free-base or crack, I don't think he could form intent at that moment. My experience with cocaine is that it's very devastating, that those who are indulgent in this do not question motivation, their own motivation at all . . . ." J.A.74-75.

the intelligence of his attempted waiver of constitutional rights. The court was obliged to do more than judge whether Moran's guilty pleas and waiver of counsel were undertaken with a cognitive awareness of the grave consequences of his decisions. In the context of Moran's desire to eliminate his defense altogether, and the fact of his medication, the Nevada courts were additionally required to determine Moran's specific competency at the juncture where he applied to waive his fundamental constitutional rights. *Drope v. Missouri*, 420 U.S. 162.[35]

The trial court evidently satisfied itself that Moran knew the likely consequences of waiving counsel, pleading guilty and refraining from placing any mitigating evidence before the sentencing panel.[36] Adopting that finding *arguendo*, Moran's very awareness of the probable consequences should have raised renewed questions in the mind of the court about Moran's *competency* to make any and all decisions pertinent to his defense. The crucial question which went unasked in the trial court was whether Moran was emotionally and mentally capable of rationally weighing the consequences of his decisions to discharge his attorneys and to plead guilty. In answering that question, the trial court could have and should have requested a new psychiatric evaluation focused on Moran's competency to proceed *pro se* and plead guilty to capital murder.

This Court decided in *Faretta v. California*, 422 U.S. 806 (1975), that a criminal defendant has a constitutional right to represent himself without counsel, so long as the

[35] *See also Pate v. Robinson*, 383 U.S. 375 (1966)(court's failure to order competency hearing denied due process); *Suggs v. LaVallee*, 570 F. 2d 1092, 1117 (2d Cir. 1978)("Because of the peculiar facts of this case, the sentencing court was obligated to inquire into Suggs' competency at plea to determine the necessity of conducting a second *Boykin* colloquy").

[36] *E.g.*, J.A.46-54.

record shows that "'he knows what he is doing and his choice is made with his eyes open.'" *Id.* at 835, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). The right vindicated in *Faretta*, however, was the defendant's right to present the defense of his choice, "to defend himself if he truly wants to do so," 422 U.S. at 817, not the right to surrender any pretense of defense by ensuring that no advocate is present who might frustrate the defendant's desire to submit to an inappropriate conviction or punishment.[37]

The United States makes the point that "[r]espondent's willingness to accept the punishment of death was not . . . definitive evidence of his incompetence or mental disability." Brief of United States at 27. We agree. However, for the decision below to be sustained, it is not necessary that Moran's incompetency be *definitively* evi-

[37] Faretta did not want to be represented by a public defender because "he believed that that office was 'very loaded down with . . . a heavy case load.'" 422 U.S. at 807. As this Court noted in *Adams v. United States ex rel. McCann*:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law . . . . What were contrived as protections for the accused should not be turned into fetters . . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards be treating them as empty verbalisms.

317 U.S. at 279-80, *quoted with approval*, *Faretta v. California*, 422 U.S. at 815. Unquestionably the *Faretta* Court saw the right of self-representation as tied to the rational desire of an accused individual to put on the best available defense. "[I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense . . . It is the defendant, therefore, who must be free personally to decide *whether in his particular case counsel is to his advantage*." 422 U.S. at 834 (emphasis added).

denced by his fatalistic or nihilistic behavior as it appears in the record. Rather, it is enough that Moran's actions, coming from a defendant whose initial competency to stand trial could not be taken for granted, should have called into question his continuing competency to participate in his own defense in any capacity. Under the due process clause, that doubt as to Moran's desire for self-preservation required a new competency hearing.

The fact that Moran was taking several medications at the time that he submitted his guilty pleas and discharged counsel should also have led the trial court to initiate an inquiry into his competency at that point in time. Yet, the court did not even bother to ascertain the nature or number of the drugs Moran was taking, let alone their possible effect on his bearing or mental condition.[38] Petitioner and his *amici* point to the fact that the prosecutor and the trial judge felt that Moran's behavior was unaffected by the medications, *e.g.*, Brief of United States at 27, Brief of Criminal Justice Legal Foundation at 8. Such opinions are of negligible weight in deciding whether a competency hearing is called for. As this Court observed in *Pate v. Robinson*, the opinion of court personnel that the defendant behaved as a competent person would behave, arrived at without independent evaluations or a hearing, cannot suffice to override other reasons to suspect that he might be acting irrationally. "While [the accused's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." 383 U.S. at 386. *Cf. Bishop v. United States*, 350 U.S. 961 (1956). In any event, it is difficult to understand how an opinion uninformed by such essential information as the names and characteristics of the drugs involved can suffice as a "finding" regarding competency.

[38] J.A.33.

The question of whether the Ninth Circuit substituted its factual conclusions as to Moran's competency for the state courts' judgment is a red herring.[39] As the Ninth Circuit recognized, the state courts never exercised the judgment that was constitutionally required because they never specifically inquired into Moran's competency to discharge his counsel and to plead guilty. Whether a federal court engaged in collateral review can determine on the record Moran's *actual* competency at the time is not the central question presented here. If the answer to that question is no, as petitioner and his *amici* suggest, this Court may direct that the case be remanded to the Nevada courts to see if a specific determination of Moran's competency at the time he discharged counsel may now be made. But such an outcome would not disturb the legal holding of the Ninth Circuit that the trial court failed to make such a determination, as due process requires, and that the subsequent state court evidentiary hearing did not cure that failure because it, too, failed to examine *specifically* Moran's competency at the juncture where he moved to discharge counsel and to enter his guilty pleas.

In any event, the propriety of the remedy ordered by the circuit court is demonstrated by this Court's holdings in *Pate v. Robinson*, 383 U.S. 375 (in view of difficulty of retrospectively determining the issue of an accused's competency to stand trial after six years had elapsed since trial, remand for a new hearing on competency could not suffice, and a new trial was ordered or defendant was to be discharged), and in *Drope v. Missouri*, 420 U.S. 162 (where trial court failed to conduct competency hearing, due process would not be protected by remanding the case for a new hearing as to whether defendant had actually been competent six years earlier).[40]

[39] The question is raised in the principal brief for petitioner, Pet.Br. at 46-49, and at greater length in the brief *amicus curiae* of the Criminal Justice Legal Foundation at 5-18.

IV. THE REQUIREMENT THAT TRIAL COURTS SPECIFICALLY DETERMINE A DEFENDANT'S COMPETENCY IN THE CONTEXT OF EVOLVING CIRCUMSTANCES DOES NOT NECESSARILY MEAN THAT THERE IS A HIGHER STANDARD OF COMPETENCY FOR WAIVING CONSTITUTIONAL RIGHTS THAN FOR STANDING TRIAL

The language of the Ninth Circuit opinion, and of the question presented in the petition for *certiorari*, has somewhat obscured the critical legal issue actually raised by this case.[41] It is not that due process necessarily requires a *higher* standard of competency to waive certain rights than to stand trial with counsel's assistance. Rather, due process requires that courts *specifically* determine competency in both contexts. That one standard is not necessarily "higher" than the other is manifest when one considers a case in which a defendant who would not be competent to assist counsel in the conduct of his defense, might be competent to tender a guilty plea:

> [A] defendant's auditory hallucinations and attentional deficits make it impossible for him to sustain his attention in a courtroom

[40] *See also McCarthy v. United States*, 394 U.S. 459 (refusing to remand the case for a hearing on whether the defendant's plea had been intelligent and voluntary; rather finding on the record that it had not been, and ordering that the defendant be given an opportunity to plead anew); *Dusky v. United States*, 362 U.S. 402 (emphasizing the difficulty of retrospectively determining competency).

[41] *Cf. Helvering v. Gowran*, 302 U.S. 238, 245 (1937)("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason").

> for more than a few minutes . . . [However], his understanding of the charges and the criminal process are unimpaired, he is able to provide pertinent information to his attorney regarding the evidence in the case, and he is able to understand the relevant considerations in deciding whether to accept a proffered plea agreement. In this case, it might be said that the defendant is competent to plead guilty even though he may not be able to stand trial.[42]

Competency, then, is a contextualized notion, and competency for one purpose may not justify an inference of competency for another. That may or may not imply more than one hearing on competency in the course of a single criminal prosecution. In this particular case, however, the separation in time between the initial determination of competency to stand trial, and respondent's subsequent decision to waive counsel and plead guilty, the medications prescribed for respondent, and the differing demands on a defendant who assists counsel in his own defense and one who decides without counsel whether to present any defense, all required a second look at the question of competency. Because that "second look" never took place, respondent's conviction cannot stand.

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[42] Bonnie, *supra n.27,* at 293-94. A nuanced definition of competency has the additional value of allowing adjudication to go forward where a defendant is competent to assist counsel, but would fail a unitary competency test which included the need for "decisional competence" of the sort required to waive counsel and conduct (or forego) one's own defense. Id. at 299.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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Dated: March 5, 1993

No. 92-725

IN THE
Supreme Court of the United States

October Term, 1992

SALVADOR GODINEZ, WARDEN

PETITIONER,

v.

RICHARD ALLAN MORAN,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the National Association Of Criminal Defense Lawyers As Amicus Curiae Supporting Respondent

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For Amicus Curiae
National Association
of Criminal Defense
Lawyers

BEST AVAILABLE COPY

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires trial courts to apply a "reasonable choice" standard to determine a defendant's competence to plead guilty or waive counsel rather than the "competent to assist counsel" standard of **Dusky v. United States**, 362 U.S. 402 (1960).

TABLE OF AUTHORITIES

Cases:

Penson v. Ohio, 448 U.S. 75 (1988)

Wainwright v. Sykes, 433 U.S. 72 (1977)

Henry v. Mississippi, 379 U.S. 443, 451 (1965)

Brookhart v. Janis, 384 U.S. 1, 7-8 (1966)

Drope v. Missouri, 420 U.S. 162 (1975)

Massey v. Moore, 348 U.S. 105 (1954)

Powell v. Alabama, 287 U.S. 45 (1932)

Faretta v. California, 422 U.S. 806 (1975)

Patterson v. Illinois, 487 U.S. 285 (1988)

Faretta v. California, 422 U.S. at 840

Constitutional Provisions:

Sixth Amendment

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 7,000 lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's

objectives, and of the entire criminal justice system, is the preservation of defendants' fundamental constitutional right to counsel within the adversary system as provided by the Sixth Amendment. The NACDL is very concerned about any case that would undermine this constitutional right, as would adoption of the position taken by Petitioner in the instant case.

The Amicus Curiae Committee of the NACDL believes that the issues discussed in this case are of such profound importance to criminal defendants, defense lawyers and the administration of criminal justice throughout the nation that the NACDL should offer its assistance to the Court.

The NACDL has obtained the consent of all parties to the filing of this brief, and letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Nevada court's inquiry of Respondent Richard Moran was insufficient to establish his competence to waive counsel and plead guilty. At most the court determined only that Mr. Moran was competent to assist counsel at trial. However, a defendant's competence to assist counsel at trial is not the equivalent of his competence to make fundamental decisions pertaining to the waiver of constitutional rights. Contrary to the argument advanced by the Solicitor General, the exercise of a defendant's constitutional right to plead not guilty does not call upon the defendant make any rational decisions pertaining to the conduct of his defense. Indeed, almost every "decision" made during the course of criminal proceedings is made by the attorney with the acquiescence of the defendant. Even the initial plea of not guilty is often nothing more than a ceremony in which a defendant is asked to affirm.

While it is true that defendants do participate in the preparation of their defense and often make critical contributions to their lawyers' understanding of the facts and weaknesses in the State's case, decisions such as what defense to present, which witnesses to challenge, and the composition of the jury, are almost always made by the lawyer alone. Only when a defendant is called upon to waive constitutional rights is the defendant forced to participate. But even in these circumstances a defendant is not asked to make decisions alone.

It cannot be assumed that a defendant who has been adjudged merely competent to stand trial is also competent to waive counsel and plead guilty, especially in a capital case. Even if the standard of competency is the same, the nature of the inquiry is different.

The trial court's inquiry here was woefully insufficient to determine the defendant's ability to make

reasoned choices. As we will show, the defendant's facial awareness of the charges against him, the penalty for these offenses, and the underlying facts supporting the State's case, do not demonstrate anything about the defendant's ability to appreciate or act upon what is in his best interest.

ARGUMENT

The argument which has been advanced by the State of Nevada and by the Solicitor General is constructed upon a premise which is at once misleading and at its foundation utterly false. It is their contention that the "mental abilities needed to make decisions concerning the conduct or one's defense are the same as those needed to make decisions about whether to plead guilty or waive counsel." (Solicitor General's Brief at 10). It follows from this disingenuous premise that if one is adjudged competent to assist counsel at trial, one must be equally competent to waive counsel or to plead guilty (id. at 11).

No lawyer who has ever represented a mentally ill or retarded defendant facing serious criminal charges much less a defendant in a capital case would make, much less believe, such an assertion.

While the law may not distinguish between the "decision" to enter a plea of not guilty and the "decision" to enter a plea of guilty, the reality is that these decisions are fundamentally different, both as to the dynamic involved in their making, and in the identity of the party making the decisions.

When a defendant enters a plea of not guilty at an arraignment or first appearance, he is not called upon to make a choice between going to trial or admitting his guilt. Indeed, where serious misdemeanors or felonies are charged, it is unlikely that a Court would even accept a plea of guilty at this very preliminary stage. This is because when called upon to plead at this early juncture, defendants rarely have full understanding of the charges against them. Even where a defendant has had an opportunity for a meaningful preliminary consultation with counsel, the facts known to client and lawyer are often limited.

In the majority of cases prosecuted in this country, the defendant ordinarily will not have had any lengthy discussion of his case with his lawyer (usually court appointed) before he is called upon to plead. When the initial not guilty plea is entered, it is not as a result of a reasoned or intelligent choice by the accused but in acquiescence to a decision made by a person the accused assumes is qualified to make these judgments - his attorney. Penson v. Ohio, 448 U.S. 75, 109 S.Ct. 346 352 (1988) ("As a general matter, it is through counsel that all other rights of the accused are protected.")

Thus, the initial entry of a plea is a routine announcement, made by the lawyer, which the defendant merely agrees to and, if inquired of by the court, affirms. And once a not guilty plea is entered, a defendant is not required to make any further decisions in his case.[1]

---

[1] The Solicitor General argues that "because a decision to stand trial is a decision not to plead guilty,

Contrary to the Solicitor General's suggestion (Solicitor General Brief at 14), defendants are not called upon personally to decide whether to present a defense. Nor are they called upon to determine the nature of the defenses to be raised, the witnesses to present, or the way in which the government's case is to be challenged. These are tactical decisions left to counsel to make. And once made are binding upon the defendant. Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443, 451 (1965); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966).

This is not to say that defendants do not participate in these decisions. In many instances they do, and sometimes their decision is contrary to the advice of

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the level of competence required to decide to stand trial should logically be the same as that required to decide whether to enter a guilty plea," (Solicitor General Brief at 13). As discussed above, this proposition is thoroughly misconceived, proving once again that in law as in most things in life, logic is no substitute for experience.

counsel. But nothing in the actual practice of criminal law requires that defendants make these decisions themselves. Thus a finding that a defendant is aware of the charges against him and is able to assist counsel is not the equivalent of a finding that the defendant would be capable of making important decisions on his own without the guiding hand of counsel.

Fundamentally, finding a defendant competent to stand trial is nothing more than a determination that a defendant has a rational understanding of the proceedings and is capable of assisting counsel. Drope v. Missouri, 420 U.S. 162, 172 (1975). It is not a determination that a defendant is capable of himself making legal or tactical decisions in the absence of the assistance of counsel.

Thus, a defendant may have the ability to assist counsel but no ability to assist himself without the guiding hand and direct assistance of counsel. In virtually

all criminal prosecutions, a defense attorney depends upon his client for an understanding of the facts. Even an innocent person is often a witness or participant in the events which have lead to criminal charges. The information that a lawyer learns about the circumstances of the crime or the defendant's companions, who may be the State's primary witnesses, is often indispensable to effective cross-examination. But in none of these instances is the defendant called upon to himself make a tactical or strategic choice as to the defense to present or the confrontation of witnesses or evidence against him.

Thus, a defendant's awareness of the factual circumstances of the crime or his judicial predicament does not necessarily mean that he has the necessary ability to influence persons or events. For instance, simply because a defendant understands that he is accused of committing a murder does not mean that the

defendant has the ability to determine if it is in his interest to plead guilty. Similarly, a defendant who assists counsel in understanding the facts and helps his lawyer to locate critical witnesses does not necessarily have an adequate appreciation of the significance of the facts to a lawful defense. For instance, knowing which persons could provide an alibi and deciding whether it is in the defendant's interest to put forth an alibi defense require very different levels of understanding and intelligence.

Where a defendant represents himself, however, decisions which are otherwise made by or in conjunction with counsel are made by the defendant alone. This presents dangers which even the most well educated persons possessing the soundness of reason may fail to appreciate. Massey v. Moore, 348 U.S. 105, 108 (1954). As this Court has repeatedly observed:

> Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

Unquestionably a defendant has the constitutional right to represent himself, even to his own detriment. Faretta v. California, 422 U.S. 806 (1975). But this assumes that a defendant is competent to make a knowing, intelligent and voluntary waiver of his right to counsel.

It cannot be assumed that a defendant who has been adjudged merely competent to stand trial is also competent to waive counsel and plead guilty, especially

in a capital case. Even if the standard of competency is the same, the nature of the inquiry is different. The role that the defendant plays in assisting his lawyer is very different from the role that the lawyer plays in assisting his client. To suggest that they are interchangeable is absurd. As we have seen, even where a defendant participates in the making of tactical or strategic decisions, he does so as part of a dynamic which is greatly influenced by the advice of counsel. However, where a defendant represents himself, fundamental choices that he could otherwise defer to his lawyer, he must now make alone.

There is nothing exceptional in Respondent's contention that a more searching inquiry was required by the circumstance presented in this case. This Court has previously held that the nature of the inquiry required before a court can accept a waiver of counsel varies depending upon the stage of the proceedings at which the defendant seeks to waive his right to counsel, with waiver at trial viewed as the most serious. **Patterson v. Illinois**, 487 U.S. 285, 299 (1988).

The State argues that if a defendant is adjudged competent to stand trial but not competent to waive counsel and plead guilty, the defendant could be denied

the benefit of plea bargaining. While we appreciate the State's benevolent interest in the welfare of the accused, that is surely not the situation presented here - where the defendant sought to plead guilty to three capital crimes and to discharge counsel, all without benefit of plea bargaining. Moreover, a defendant's ability to engage in plea bargaining will almost always be enhanced by the presence, not the absence, of counsel.

Thus a finding that a defendant is not competent to waive trial and plead guilty without counsel does not necessarily mean that he will be denied the opportunity to engage in plea bargaining. It simply means that he will have to be assisted in this process with counsel.

In the instant case, the court relied heavily upon the reports of two psychiatrists who were only asked to determine whether the defendant was capable of assisting his lawyers. The psychiatrists, however, were not asked to determine the defendant's ability to make rational decisions either to represent himself or to plead guilty - without plea bargaining - to three capital charges.

The trial court's own inquiry was also woefully insufficient to determine the defendant's ability to make reasoned choices. As we have argued, the defendant's

facial awareness of the charges against him, the penalty for these offenses, and the underlying facts supporting the State's case, do not demonstrate anything about the defendant's ability to appreciate or act upon what is in his best interest.

We recognize that suicide and competency are not irreconcilable and that a person may be perfectly sane and choose to die. Yet the courts must be sensitive to attempts by defendants to use the judicial system to achieve such ends. **Faretta v. California**, 422 U.S. at 840 (Burger, C.J., dissenting)("The system of criminal justice should not be available as an instrument of self-destruction). Plainly, the attempt to end one's life is powerful evidence that the respondent's judgment was seriously impaired. Here the trial court had ample reason to question his competency to waive counsel and plead guilty. Respondent was a long time abuser of alcohol, he had likely committed two of the murders while under the influence of cocaine and he had attempted to take his own life. Having failed to do so, he now sought the assistance of the State in making that attempt - a decision made while he was presently taking four different medications. Surely, the trial court's superficial inquiry was woefully inadequate to establish

that this was a knowing, intentional and voluntary waiver - albeit a suicidal waiver - of respondent's constitutional rights.

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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